

051 ✓
No. 15664

United States
Court of Appeals
for the Ninth Circuit

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTI-
QUE,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 15 1957

PAUL P. GIBSON, CLERK

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WALTER HERBERT MACARTNEY,

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOHN F. CONWAY,
504 Henry Building,
Portland 4, Oregon,
For Appellant.

WOOD, MATTHIESSEN, WOOD & TATUM;
LOFTON L. TATUM,
1310 Yeon Building,
Portland 4, Oregon,
For Appellee.

THE HISTORY OF THE CITY OF BOSTON

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME
BY SAMUEL JOHNSON
IN TWO VOLUMES
VOL. I.

BOSTON: PUBLISHED BY S. JOHNSON, 1790.
AND SOLD BY ALL THE BOOKSELLERS IN THE TOWN.
LONDON: PRINTED BY J. JOHNSON, ST. PAUL'S CHURCH-YARD, 1790.

In the District Court of the United States
for the District of Oregon

Civil No. 8512

WALTER HERBERT MACARTNEY,

Plaintiff,

vs.

COMPAGNIE GENERALE TRANS-ATLAN-
TIQUE, a Corporation,

Defendant.

PRETRIAL ORDER

As the result of pretrial conference heretofore had, whereat the plaintiff was represented by John F. Conway and the defendant was represented by Lofton L. Tatum of Wood, Matthiessen, Wood and Tatum, its attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1. Defendant was and now is a foreign corporation existing under the laws of the Republic of France; it had and now has a Pacific Coast agent and maintains a regular sailing schedule of its vessels to and from the port of Portland, Oregon.

2. That at all material times this plaintiff was and now is a citizen of the United States and lived and resided in and still has his residence and domicile in Portland, Oregon, and this controversy involves a cause for more than \$3,000.00 damages.

3. That at all times hereinafter mentioned the M/S Wyoming was and is a French motor ship, in the possession of and owned, operated and employed by defendant corporation in maritime commerce, as a passenger and merchant vessel between points in Europe and points in the United States of America.

4. That on or about October 10, 1954, the defendant had a stevedoring contract with the Oregon Stevedoring Company, an Oregon corporation, to act as stevedores for defendant's vessels, including the M/S Wyoming at Portland, Oregon.

5. That on or about and prior to October 10, 1954, plaintiff was regularly employed by said Oregon Stevedoring Company as a longshoreman to assist in unloading cargo on said vessel as aforesaid at Portland, Oregon, and at the time of the occurrences hereinafter mentioned, the plaintiff was engaged in the performance of his regular duties and in the course of his regular employment with said Oregon Stevedoring Company, working on board such vessel and in connection with unloading such cargo, while said vessel was moored and docked on navigable waters.

6. That in the afternoon of October 10, 1954, plaintiff was working in No. 4 hold of said vessel in connection with unloading cargo consisting of heavy crates of glass which were moved on a certain hand operated, 4-wheeled dolly, which had been furnished by and were being used by said Oregon Stevedoring Company and its employees.

7. That at all material times there was and now is in full force and effect, a Pacific Coast Marine Safety Code, which was agreed to and adopted under the provisions of the Pacific Coast longshore agreement.

8. Plaintiff has elected to pursue a remedy against defendant pursuant to the Longshoremen and Harbor Worker's Compensation Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation at Seattle, Washington, a notice of his election to sue.

Plaintiff's Contentions

1. That on or about October 10, 1954, at about 2:30 o'clock p.m., while said vessel was so moored and docked at Portland, Oregon, and in the course of his employment, this plaintiff was required to be in and work in No. 4 hatch of such vessel, and was required to use a certain hand operated, four-wheel dolly or hand truck, in performing and doing his regular duties and work in connection with assisting in such cargo unloading operation. That such dolly or hand truck was supplied and furnished by said Oregon Stevedoring Company, Inc., for use in and to be used in connection with such cargo unloading operation, and it was used by plaintiff and other longshoremen to move heavy pieces of plate glass in a crate, weighing approximately 1,500 pounds or more, from one place to another on said vessel.

2. That no other means or methods were provided for plaintiff and the other longshoremen he was assisting to perform their work in connection with such cargo unloading operation.

3. That the defendant owners or charterers of such vessel, or their said agents, then and there so carelessly and negligently maintained and operated the said vessel and dolly or hand truck in an unseaworthy and defective condition in that said hand truck was improperly constructed and top heavy, or defendant negligently caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, heel over, and while so doing and having so done, defendant negligently failed to warn this plaintiff in time or at all that such vessel was about to and did lurch, careen, tilt, slant, lean, heel over so that when this plaintiff was standing near to such hand truck, with his back toward such truck, and while it was loaded with a large heavy piece or pieces of plate glass in a crate, weighing approximately 1,500 pounds, that said hand truck suddenly and without any warning tipped over and thereupon violently precipitated said heavy crate of plate glass downward and onto both legs of plaintiff from behind, and plaintiff then and there received the grave and serious injuries hereinafter alleged.

4. Plaintiff contends that certain provisions of said safety code were applicable to the accident complained of in this case, to wit:

Section II, Rule 201. The owners and/or operators of vessels shall provide safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship.

Section II, Rule 205. The safety duties of the supervisory personnel, walking boss, ship and dock foremen, and assistant ship and dock foremen, are:

(a) To see that all working conditions are safe and that the gear is in apparent safe working condition during the operation.

(c) To see that operations are carried on in a safe manner.

(d) Where conditions warrant and he is not in immediate touch with his superintendent or other employer's representative, to stop work if necessary to avoid accidents.

5. That said accident was caused without any contributory fault or neglect on the part of plaintiff, and solely and proximately by the defective, unsafe and unseaworthy condition of said vessel and by the failure of defendant to provide proper and sufficient ways, works, means and appliances on said vessel and by the fault and negligence of the defendant, acting by and through its agents, officers, or representatives, in the following, among other particulars:

(a) In allowing to remain and continuing to use a dangerous and unsafe and unseaworthy dolly or hand truck, as part of the regular gear, appli-

ances and equipment used on said vessel when said defendant and its agents knew, or in the exercise of ordinary care should have known, that allowing such dolly or hand truck so to be used in such condition created a grave and imminent hazard to persons using same and working near said truck, and particularly this plaintiff;

(b) In failing to inspect and discover the said hazardous and dangerous dolly or hand truck;

(c) In that the defendant, through its master or agents of the said steamship improperly directed this plaintiff to work in an unreasonable, defective, unsafe and dangerous place where he was exposed to extreme danger of being struck by the fall of such a large heavy crate of plate glass, which did fall as herein described;

(d) That said vessel was unseaworthy by reason of using said improperly constructed and top heavy, defective, and unsafe dolly or hand truck, in connection with such cargo unloading operation.

(e) In failing to warn plaintiff of the defective, unsafe and unseaworthy condition of said dolly or hand truck.

(f) In negligently causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, heel over, and while so doing and having so done, defendant negligently failed to warn this plaintiff in time or at all that such vessel was about

to and did lurch, careen, tilt, slant, lean, heel over and such ship did thereby become unsafe and unseaworthy under the existing circumstances, causing said dolly to tip over and precipitate such crate of glass upon plaintiff, when defendant knew that plaintiff was working under such conditions.

(g) Defendant failed to provide adequate and safe ship's gear, appliances and equipment, and a safe working place for all stevedoring operations on board said ship, including more particularly, the operation whereby plaintiff was injured.

(h) Defendant failed to see that all working conditions were safe, and that the gear and appliances used were in apparent safe working condition during the operation complained of herein.

(i) Defendant failed to stop said work and operation in order to avoid an accident and injury to plaintiff.

6. That as a direct and proximate result of the said unseaworthiness of said vessel and of its ways, works, means and appliances, and said negligence of the defendant and the aforesaid violations of said Pacific Coast Marine Safety Code this plaintiff was violently struck by said large, heavy crate of glass as aforesaid and precipitated downward onto a part of the hold of said vessel and plaintiff thereby received and sustained a severe tearing, twisting and wrenching of the bones, tendons, muscles and ligaments and severe crushing, mashing, bruises and

contusions to both of his legs, and also received compound fractures of both of his tibias and fibulas, and general shock, some of which injuries are of a permanent nature, and all of which injuries have caused plaintiff great mental and physical pain and disability, and also required plaintiff to have and be placed in a large heavy cast on both of his legs for a long time.

7. That by reason of all said injuries plaintiff has suffered general damages in the sum of \$85,000.00.

8. That plaintiff, by reason of said injuries will always be disabled to a substantial degree from engaging in his regular or any gainful occupation, and will always have limitation of motion and of the use of his legs and body, and has lost wages in the sum of \$22.50 per day, making a total of \$8,000.00 to the time of trial. That as long as plaintiff is unable to return to his regular or any occupation, he will continue to lose the sum of \$22.50 per day, which sum he claims as his special damages herein.

That prior to and at the time of said accident, plaintiff was a strong, healthy, able-bodied man, 45 years of age, with a life expectancy of 24.54 years.

9. That as a further result of said injuries plaintiff has been compelled to incur expenses in securing medical care and treatment, and was required to undergo a major surgical operation on each of his legs, and be hospitalized for a long time, and he will in the future continue to incur large expenses for

medical care and treatment, and that by reason thereof plaintiff has been further especially damaged in the sum of not less than \$1,989.40.

Defendant's Contentions

1. Denies the contentions of plaintiff.

2. The dolly or hand truck being used by plaintiff and his fellow longshoremen was supplied to said longshoremen by Oregon Stevedoring Company, Inc., plaintiff's employer. Said dolly or hand truck was of the same general type as has been supplied by stevedoring companies for use by their employees in the port of Portland, Oregon, for many years prior to plaintiff's alleged injury.

3. Said dolly or hand truck was not owned or supplied to plaintiff by defendant.

4. If said dolly or hand truck was defective in any manner as alleged by plaintiff, the responsibility therefor rests solely upon the plaintiff's employer, Oregon Stevedoring Company, Inc., and not upon defendant.

5. Plaintiff's injury was caused wholly or in part by his own negligence in leaving the crate of glass unattended upon the dolly, in standing in front of a loaded dolly, in failing to keep a lookout and in failing to act as an ordinarily careful and prudent longshoreman.

6. Plaintiff's injury was caused wholly by the negligence of plaintiff's employer in furnishing an allegedly unsafe dolly or hand truck, in failing to

inspect said dolly or hand truck, in improperly and inadequately supervising plaintiff's work and place of work, in failing to warn plaintiff of the allegedly unsafe dolly or hand truck, in failing to provide safe and adequate gear, appliances and equipment and a safe working place for plaintiff, in failing to see that all working conditions were safe and that the gear and appliances used were in apparent safe working condition, and in failing to stop said work and operation in order to avoid an accident and injury to plaintiff.

7. Plaintiff's injury was caused wholly or in part by the negligence of his fellow longshoremen in failing to attend the crate of glass upon the dolly, and in bringing a loaded dolly into position when there were other operations being conducted.

8. Plaintiff denies the contentions of defendant.

Plaintiff's Exhibits

1. Pacific Coast Longshore Agreement
2. Pacific Coast Marine Safety Code
3. Photographs
4. X-Rays
5. Medical Reports
6. Income Tax Returns
7. Hospital records regarding plaintiff.

Defendant's Exhibits

21. Deposition of plaintiff
22. Photostats of deck log
23. Photostats of cargo plan

24. Deposition of Chief Mate Canoen

25. Supercargo reports

26. Depositions of longshoremen

Lundstrom

Fantz

Roberson

Christiansen

Foster

Sofich

Raanes

De Francisco

Thomas

Walker

27. Sketch

The exhibits heretofore referred to have been identified and received as pretrial exhibits, the parties agreeing with the approval of the Court that no further identification of exhibits is necessary, and in the event that said exhibits or any thereof should be offered in evidence at the time of trial, such exhibits are subject only to the objections of relevancy, competency and materiality.

All of the parties reserve the right to call expert witnesses.

This order represents the result of pretrial conferences held between the parties, their attorneys and the Judge presiding in open court.

It Is Hereby Ordered that the foregoing constitutes the Pretrial Order in the above-entitled cause and supersedes the pleadings in the within cause,

but may be amended after signature or during trial only upon agreement of the parties, or by order of this Court to prevent manifest injustice.

Dated and signed in open Court this 23rd day of April, 1957.

/s/ GUS J. SOLOMON,
United States District Judge;

/s/ JOHN F. CONWAY,
Of Attorneys for Plaintiff;

/s/ LOFTON L. TATUM,
Of Attorneys for Defendant.

Lodged: January 1, 28, 1957.

[Endorsed]: Filed April 24, 1957.

In the United States District Court
for the District of Oregon
Civil No. 8512

WALTER HERBERT MACARTNEY,
Plaintiff,
vs.

COMPAGNIE GENERALE TRANS-ATLAN-
TIQUE, a Corporation,
Defendant.

JUDGMENT ORDER

This cause came on for trial before the Honorable Gus J. Solomon, Judge of the above-entitled Court,

and a jury duly impaneled and sworn on the 23rd day of April, 1957, the plaintiff appearing in person and by John F. Conway, his attorney, and the defendant appearing by one of its attorneys, Lofton L. Tatum. Whereupon, opening statements of counsel were made and testimony taken on behalf of each party and thereafter the cause was argued by the counsel to the jury and the Court instructed the jury as to the law and the jury retired in charge of a properly sworn officer to consider interrogatories submitted to it and its verdict and thereafter said jury returned into the Court the following interrogatories:

“[Title of District Court and Cause.]

“INTERROGATORIES

“We, the jury, answer the special interrogatories submitted to us as follows:

“1. Was the dolly unseaworthy or unsafe?

“A. No.

“2. Was the M/S Wyoming caused to lurch, careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time?

“A. No.

“Dated this 24 day of April, 1957.

“HERMAN J. FOELLER,

“Foreman.”

and the following verdict:

“[Title of District Court and Cause.]

“VERDICT

“We, the jury, being first duly sworn and impanelled to try the above-entitled cause, do hereby find our verdict in favor of the defendant.

“Dated at Portland, Oregon, this 24 day of April, 1957.

“HERMAN J. FOELLER,
“Foreman.”

which interrogatories and verdict were received by the Court and ordered filed.

Therefore, upon motion of the defendant for judgment upon said verdict,

It Is Adjudged that judgment upon the issues of this case be entered in favor of the defendant, that the plaintiff's complaint be dismissed and that defendant have and recover from said plaintiff Walter H. Macartney its costs and disbursements herein taxed in the sum of \$107.90 and that execution issue therefor.

Dated this 24th day of April, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed April 29, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Compagnie Generale Trans-Altantique, a corporation, defendant, and to Wood, Matthiessen, Wood and Tatum and Lofton L. Tatum, your attorneys of record.

You, and each of you, are hereby notified that the above-named plaintiff, Walter Herbert Macartney, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on or about April 24, 1957.

This appeal is taken on both questions of law and fact.

/s/ JOHN F. CONWAY,
Attorney for Plaintiff-Appellant.

Receipt of Service acknowledged May 21, 1957.

[Endorsed]: Filed May 22, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED
INSTRUCTIONS

Comes now the plaintiff and respectfully requests the Court to give the following instructions to the jury:

* * *

VIII.

If you find on the instructions given to you, from a preponderance of satisfactory evidence, that Mr.

Macartney, the plaintiff, is entitled to a verdict at your hands, and will award to him such an amount of money as will adequately compensate him for his injuries and damages, bearing in mind that the burden is on the plaintiff to establish by a preponderance of satisfactory evidence the nature and extent of his injuries and damages.

In awarding damages, if any, you will take into consideration the nature and extent of his injuries, and which of such injuries are temporary or permanent in character, his pain and suffering endured, and which he will endure in the future, if any, as a proximate result of the accident; his mental anguish, if any, any future loss of earnings he will sustain resulting from this accident, and then allow plaintiff whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and within the confines of my instructions, not exceeding \$85,000.00, the amount demanded by plaintiff in this case as general damages.

In connection with this subject of damages you may also allow Mr. Macartney certain additional or special damages, if any, for reasonable expenditures incurred for medical and surgical care, hospitalization, for cost of X-Rays, and loss of earnings, as a longshoreman, if any, that Mr. Macartney sustained up to the time this case was tried, and then allow him whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and not exceeding the sum of \$9,963.40 claimed by Mr. Macartney as special damages in this case.

United States District Court,
District of Oregon

No. Civil 8512

WALTER HERBERT MACARTNEY,

Plaintiff,

vs.

COMPAGNIE GENERALE TRANS-ATLAN-
TIQUE, a Corporation,

Defendant.

April 23, 1957—10:00 A.M.

Before: Honorable Gus J. Solomon, District Judge,
with a jury.

Appearances:

JOHN F. CONWAY,
Attorney for Plaintiff.

LOFTON L. TATUM,
Of Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY AND PRO-
CEEDINGS ON TRIAL OF ABOVE-EN-
TITLED CAUSE

* * *

HENRY L. FOSTER

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

Q. Where do you reside, Mr. Foster?

A. You will have to talk pretty loud. I don't hear very good.

Q. Is it hard for you to hear me?

A. Yes, I don't hear very good.

Mr. Conway: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Conway): How old a gentleman are you? A. 58.

Q. Are you married? A. Yes.

Q. How long have you been working as long-shoreman in Portland? A. 38 years.

Q. Have you worked in all departments?

A. I have.

Q. Where were you working on October 10, 1954, on the day Mr. Macartney was hurt?

A. I worked on the same ship.

Q. That was the Wyoming? [4*]

A. Wyoming.

Q. What was your job at that time?

A. I was on the other side from him.

Q. You were on the inshore side?

A. Yes, on the inshore side.

(Testimony of Henry L. Foster.)

Q. He was on the offshore side?

A. Yes, sir.

Q. How far away were you working from Mr. Macartney, approximately?

A. About, approximately 20 feet.

Q. How many cases of—or crates of glass had this gang taken out that day before Mr. Macartney was hurt?

A. Oh, several of them.

Q. How was the ship moored at the dock?

A. Oh, it was tied with ropes, lines.

Q. How many lines?

A. It had a couple of head lines, a spring line forward and aft.

Q. Do you remember which dock?

A. Terminal No. 1.

Q. How was this glass cargo stowed in this hatch?

A. Well, some of it was stowed in the wing. Some of it was stowed thwartship, and some of it was stowed fore and aft in the midship.

Q. Explain to the jury what you mean by what you just said? [5]

A. Well, that fore and aft is fore and aft, the ship length, and thwartship would be crossways. The glass would be sitting crossways.

Q. Was the bow of the ship upstream or downstream?

A. Upstream.

Q. Upstream. Was this glass cargo stowed between decks?

A. It was, and in the shelter deck, yes, the second deck.

(Testimony of Henry L. Foster.)

Q. Second deck.

A. From the boat deck down the first.

Q. Did you see Mr. Macartney just before the accident happened? A. I did.

Q. What was he doing when you saw him immediately before the accident?

A. Well, I tell you, what he was doing, there was a small crate of glass. It was about possibly six inches thick and 12 or 14 feet long and about 9 feet high, and the glass was standing there, and, naturally, a small piece of glass, tall like that, you got to steady it to keep it from falling over.

Q. Where was this glass?

A. Sitting on blocks.

Q. That was out——

A. Out in the hatch a little bit. It was about four feet from the coaming on two blocks, and Macartney was steadying that glass for the sling to come in to take it out. [6]

Q. And the sling came in from overhead, did it, Mr. Foster? A. Yes, come in from overhead.

Q. That was located on a boom, was it?

A. Yes, two booms.

Q. Two booms.

A. One short-arm, a midship boom. One of them could have been pretty straight. The other one is pretty flat.

Q. Explain to the jury what you mean now.

A. Well, the cargo in the square of the hatch, it's just like this (indicating), and your boom, you lower it to the work.

(Testimony of Henry L. Foster.)

Q. Tell them what a boom is, Mr. Foster.

A. Well, a boom is, well, a boom is a loading arm.

Q. What is it made out of?

A. Of the ship, and it has got a block on the end for the wires to go through for the cables to go through your hooks onto the other boom. Then you got your preventers on there and your safety guys on there to keep it from swinging back and forth and down.

Q. Then how are the cables operated?

A. The cables are operated by winch, two winches, double winches.

Q. What kind of power do they have?

A. Well, some of them is electric, some of them —on this one I think it was electric. I am sure. [7]

Q. Then you say Mr. Macartney was standing by this case of glass that was out in the square of the hatch a little bit?

A. He was, yes.

Q. Was he——

A. He was steadying the glass.

Q. Steadying.

A. A case of glass, a piece of glass that small, you know, it would tip over easy.

Q. How was he facing?

A. He was facing the hatch. He was on the off-shore side with that, for the, the sling was on the yardarm, and it would come in to the midship, and, naturally, he would be watching the dock for the sling.

Q. Would he be facing the dock, Mr. Foster?

(Testimony of Henry L. Foster.)

A. He would.

Q. The dock would be inshore?

A. Yes, sir.

Q. How far away from him were you standing when you saw him doing this?

A. Oh, I was not over 15 feet.

Q. While Mr. Macartney was waiting for the hook, the sling to come in, what did you see take place?

A. Well, I just seen the movement, a flash, and somebody hollered, and I went over there, and the glass was on him. [8]

Q. Which glass are you talking about now, Mr. Foster?

A. Well, they got a dolly. I could draw a picture of it easier.

Q. I will show you this one that Counsel has (presenting sketch to the witness). Mr. Foster, take this pointer and show the ladies and gentlemen where you were. This sketch here, Mr. Foster, represents a diagram that we were talking about at the time we took the depositions in this case some months ago. Do you remember?

A. No, but this diagram is the flat part of the dolly. You haven't got no diagram of the dolly the way the glass was sitting on it.

Q. That is right.

A. There is no diagram there at all.

Q. That is right; but will you explain what you are talking about?

A. You see, this is the bottom part of the dolly.

(Testimony of Henry L. Foster.)

Well, the dolly was sitting this way. It would be a small angle. It would be a small angle like that (indicating). The glass, short glass, would be laying against the dolly against the framework, and you have not got a picture here.

Q. Here is a picture, Mr. Foster. Tell the folks what you mean.

A. All right; here is the framework here, and the dolly is about this tall, and it has not got much lean to it for a [9] short piece of glass.

Well, if you get too short a piece of glass, it don't cut so much weight as a heavy piece of glass where it hangs over so much, and this was a short piece, four feet, and it was on this dolly, and that gives the dolly a tendency to tip from the boom. When the glass, heavy glass, comes on the end of a boom it made the ship list.

Mr. Tatum: I object to that, your Honor.

The Witness: It turned the glass off the dolly.

The Court: I did not hear what he said. I couldn't hear.

Mr. Tatum: He said that if the piece of glass was at the end of the boom it would cause the ship to list.

The Court: If the piece of glass was at the end of the boom it would cause the ship to list?

The Witness: Do you understand what I mean? You see, you have got a boom.

Mr. Tatum: Wait a minute, Mr. Foster.

The Court: I think that the testimony is objectionable on many grounds, including the fact

(Testimony of Henry L. Foster.)

that he is expressing an opinion when there are no qualifications of his ability to express the opinion. The jury is instructed to disregard the statement. I think that this is probably a good time to take our noon recess. We will recess until 2:00 o'clock this afternoon. You are excused until that time. [10] Please remember my admonition. Do not make up your mind as to how this case is to be decided until you have heard all the evidence, the argument of counsel and the instructions of the Court.

(Noon recess taken). [11]

Afternoon Session—2:00 P.M.

(At 2:00 p.m. on April 23, 1957, the trial herein was resumed as follows:)

HENRY L. FOSTER

resumed the stand as a witness in behalf of Plaintiff herein and was further examined and testified as follows:

Direct Examination

(Continued)

By Mr. Conway:

Q. While Mr. Macartney was waiting for the hook and sling to come down into the hatch, what did you see take place?

A. Well, he was hanging onto a piece of glass. He went over, and somebody hollered, and we went over there and picked the glass up.

(Testimony of Henry L. Foster.)

Q. Which way was Mr. Macartney facing when you looked at him? A. Facing the dock.

Q. Facing the dock?

A. Yes, kind of across-ship.

Q. What was it that fell upon him?

A. Well, it was a piece of glass about 10 to 12 inches wide and about 8 to 10 feet long.

Q. How high?

A. Well, about 4 feet. [12]

Q. What was the glass in?

A. In a case, a wooden case.

Q. A wooden case? A. Yes.

Q. How much did it weigh, approximately, the case?

A. Oh, somewhere between 1,500 and 2,000.

Q. Pounds? A. Yes.

Q. What part of the case fell upon what part of Mr. Macartney?

A. Well, the top went over and caught him in the back of the legs about halfway between his knee and the foot and fell on top of him, and he had both feet then under the case.

Q. Both feet underneath it?

A. Both feet underneath it.

Q. Then what did you do when that happened?

A. Well, we picked the case up. There was eight of us in the hold picked it up. All of us lifted on the case and got it up, and when he fell backwards on top of the case like this, his feet were underneath it, and when we got his feet clear I caught

(Testimony of Henry L. Foster.)

him in my arms and packed him over and put him on a board sling to take him on the dock.

Q. You say you packed him in your arms?

A. Yes.

Q. Explain to the ladies and gentlemen here and the Court [13] what you mean by the board sling.

A. Well, a board sling is a lift sling. It is four inches high, and it has got a lip on the corner to put the board underneath there, and it has got a plug here to stop it off and two spreaders come up on the side to make one bundle for to send the board sling on the dock.

Q. How large is that board you are talking about?

A. Oh, it's about six feet long, four feet wide.

Q. You say you took him to that board?

A. Yes.

Q. Then what did you do?

A. We took him, two of us rode the board to the dock and took him onto the pier and waited for the ambulance to come, and we noticed the gear was—the ship was getting light. All the cargo was out of the bottom, and you could see the booms working the ship.

Mr. Tatum: If your Honor please, I think it is not responsive to the question.

The Court: The answer is not responsive.

Mr. Conway: I will connect it up, your Honor.

Q. What did you do when you got outside on the dock there, Mr. Foster, with respect to watching

(Testimony of Henry L. Foster.)

the ship immediately after you got out there? Did you look at it? A. Yes, we did.

Q. What did you see? [14]

* * *

A. As we was on the dock waiting for the ambulance to come, the walking boss come down the dock.

Q. What was his name?

A. Harry Hangland. He was standing there. He is the big shot for Oregon Stevedore, and he come down the dock, and we watched the short-arm boom, and it moved. You could see it move from the weight of the glass on the short-arm.

Q. Were they taking glass out of the hold at that time?

A. Yes, taking glass out of several hatches.

Q. What did you tell Mr. Hangland, the walking boss? A. I told him it would——

The Court: Wait a minute.

Mr. Tatum: I object to that, your Honor, as hearsay. Mr. Hangland is not our employee.

The Court: That is his own employer. This is not a case against his own employer. I do not understand what he said anyway. He said that he watched it from the dock and he saw the boom moving up and down; is that right?

The Witness: That is right. You understand, Judge, what a boom is?

The Court: Oh, yes; I know what a boom is, but I do not understand what the significance of the testimony is that the boom was moving up and down.

(Testimony of Henry L. Foster.)

The Witness: Well, it would be the rolling of the ship which caused the boom to go up and [16] down.

Mr. Conway: Well, that is what the Judge wants to know. What did the ship do?

The Witness: Well, the ship rolled. That is what caused the boom, when a ship rolls, like your body.

Q. (By Mr. Conway): Which way did it roll?

A. Rolled down and up.

Q. Did it roll towards the dock?

A. Your body, see, and your arm is like a yard. Well, it came like that. The whole ship has got to move, ain't it?

Q. Which way did it move?

A. It moved down with the glass when it was on the short-arm. It come down, and it would go up, and the glass landed on the pier.

Q. How much did it make the ship list when it did not——

A. Well, I don't know that.

Mr. Tatum: Just a minute, your Honor.

The Court: Just a minute.

Mr. Tatum: I object to that as a leading question. The movement of a ship in the water is not a list, and the question of degree I think is a matter of expert opinion, and I do not think this witness can estimate how many degrees the ship listed.

The Court: Perhaps he can. Are you in a position to estimate the amount of list?

The Witness: No, I couldn't tell, on the end of [17] a 90-foot boom, you see, I can't tell that.

(Testimony of Henry L. Foster.)

The Court: You cannot tell?

The Witness: No.

The Court: Go ahead.

Q. (By Mr. Conway): Put it this way, Mr. Foster. Was it a small amount of list or a larger amount? A. Well, quite a lot.

Mr. Tatum: If the Court please, that is objected to. That is conjecture.

Mr. Conway: Wait a minute until he gets a chance to object. When you see him stand up, don't say anything because he wants to object.

The Court: I am going to let him testify. It is not clear, but I think you may bring it out on cross-examination. Go ahead.

The Witness: Well, you take on the end of a 90-foot boom sticking out 90 feet, and when the ship lists it will move the boom quite a bit on the end.

The Court: Are you talking about a roll; not a list?

The Witness: A roll, yes. Well, it will cause it to list. It is clanky.

The Court: All right, the witness meant roll and not list.

Mr. Tatum: Then I move that it be stricken because it is not within the issues of this case. [18]

* * *

Q. (By Mr. Conway): By the way, Mr. Foster, I forgot to ask you, this picture of this dolly, Exhibit 3-B, that is the one that you talked about before on your deposition; do you remember?

(Testimony of Henry L. Foster.)

A. That is right.

Q. Is that the same type of dolly that you were using that day? A. It looks the same.

Q. Who furnished the dolly, what stevedoring company? A. Oregon Stevedore.

Q. Oregon Stevedoring. All right; that was the same stevedoring company that you and Mr. Macartney were working for that day?

A. That is right.

Q. What is that particular dolly made of, Mr. Foster?

A. Well, it is made of aluminum pipes and light metal.

Q. Does it have any wheels on it?

A. Yes, it has four wheels on it.

Q. Whereabouts?

A. On the bottom part of it. The dolly tips this way and then slats under that, little prongs on the bottom there. I don't think—this has got a plate. There was a plate [19] under the dolly, a little, small bit of iron that goes there.

Q. You mean you are talking about those little wings on the corner?

A. Yes, when it fell on Macartney it never come to the top of this dolly.

Q. You mean the case of glass? A. Yes.

Q. It didn't come to it, to the top, about two-thirds of the way up?

A. Yes, about two-thirds of the way up, maybe a little bit more.

Q. Did that case that fell off the dolly that fell

(Testimony of Henry L. Foster.)

on Macartney, did it stick over each end of the dolly? A. It did.

Q. About how much?

A. Oh, a couple feet.

Q. Then you say it was how thick, Mr. Foster?

A. About 10, 12 inches. I never measured it.

Q. And it was made of wood?

A. That is right.

Q. What was the floor of this hatch made of where they were loading this glass?

A. Well, it was a steel deck, and then the hatch covers was wood.

Q. How many men did it take to lift this case of glass off [20] of Mr. Macartney?

A. Well, there was eight of us lifting on it.

* * *

Q. (By Mr. Conway): Did you work in the other hold before you worked in this hold that day?

A. Yes, we did. We discharged.

Q. What did you unload? A. Steel. [21]

Q. Steel? A. Plate steel.

Q. Do you remember what hold it was?

A. I think it was No. 2.

Q. When you got through unloading steel from that hold, was the hold empty or full?

A. Empty.

Q. Can you tell the Judge and jury what a tender ship is?

The Court: A what?

Mr. Conway: A tender ship.

(Testimony of Henry L. Foster.)

A. Well, it is cranky.

Q. What do you mean?

A. Well, it rocks easy, rolls. A ship that is loaded, when it is loaded with a heavy load on the boom, it rolls.

Q. Was that the kind of a ship that this was that afternoon?

A. It was.

Q. What?

A. It was, yes.

Q. From your own best recollection can you tell what caused this plate of glass to fall off of the dolly?

Mr. Tatum: If your Honor please, that is a question to be answered by the jury.

The Court: Yes; objection sustained.

Q. (By Mr. Conway): How did you pick up Mr. Macartney after the case of glass was lifted off of him? [22]

A. Well, when—he fell backwards on the piece of glass with his foot underneath on the back like that (indicating) and his knees buckled and laid right on the glass when he had his knees over the edge of the glass as it come up. Then I went around and packed him in my arms and carried him over on the board.

Q. Before this accident happened that day, Mr. Foster, while you yourself were unloading glass cargo on the other side of the ship from where Mr. Macartney was, did you notice any list to the ship?

A. Yes, it had an inshore list because——

Q. How did you happen to notice that?

A. Well, we noticed their glass over the other

(Testimony of Henry L. Foster.)

side, they didn't have to push on that like we did and wheel it up there to the hatch coaming.

Q. Well, explain what you mean by that to the jury.

A. Well, you could tell by the way the guys was pushing on their glass theirs was coming downhill, and ours was going uphill.

Q. In other words, the glass that you were moving from the inshore side of the ship to the hatch, you were pushing that uphill; is that right?

A. Yes.

Q. What kind of a deck was it?

A. Steel deck. [23]

Q. Steel deck. You were using the same type of dolly in this picture?

A. That is right.

Q. Then you noticed that was the condition on the offshore side. It was sloping toward the inshore side of the hatch; is that right?

A. It was.

Q. What did you notice about Mr. Macartney when you took the case of glass off of him?

A. Well, when I picked him up in my arms the bones was sticking out of his legs about that much (indicating).

Q. When you say "that much," how much do you mean?

A. Well, about two inches, something like that.

Q. Which leg?

A. Both of them.

Q. Was there any bleeding of his leg?

A. No, we looked when I got him on the board, and I pulled up his pants legs to see whether he was bleeding or not. You know, a guy can bleed

(Testimony of Henry L. Foster.)

pretty easy with the bones sticking out of his leg, but it was punctured through the skin so tight that there was no bleeding.

Q. Was he complaining of any pain?

A. Yes; when I was carrying him over, Tom placed his hand under his feet—George, I mean George, and he said, “Take it easy with me.” [24]

Q. When you got out on the dock like you stated a little bit ago, how long were you out there with Mr. Macartney before the ambulance came to take him to the hospital?

A. Well, I really don’t know. It was quite a few minutes.

Q. While you were there on that occasion did you look from time to time at the ship to see what the ship was doing?

A. We did, and talked about it. The walking boss and I talked about it.

Q. While you were doing that, did that condition of the ship happen more than once?

A. It did every load of glass.

Mr. Tatum: If your Honor please, what condition? I think it is an indefinite question, that the condition continued to exist—what condition?

Q. (By Mr. Conway): I am talking about, Mr. Foster, the condition you noticed of the ship rolling back and forth. How many times did you notice that while you were watching for the ambulance to come?

A. Well, every time—the gears was all working practically together, and every time they would bring a load of glass out until they dropped them,

(Testimony of Henry L. Foster.)

then it would straighten and back up again (indicating).

Q. By that do you mean several times?

A. Several times, yes.

The Court: I did not understand that. Is it [25] your testimony that every time the boom picked up a load that the ship rolled?

The Witness: That is right.

The Court: The ship rolled with the loading?

The Witness: Yes, coming over to the dock side, you see, when they would pick it up from midship and take it over on the yard, when they would get the heavy glass on the yard it would rock, roll.

Q. (By Mr. Conway): You mean over the dock, Mr. Foster?

A. Yes, over the dock because it was not in midship because you were picking right straight up in the midship.

Q. Mr. Foster, the kind of crate that was on this particular dolly on that occasion that fell on Mr. Macartney, is that particular type of crate harder or easier to take off a dolly than a taller crate would be?

A. Well, it's a lot easier——

Mr. Tatum: If your Honor please——

Mr. Conway: Just a minute.

Mr. Tatum: I object to that as indefinite, vague, the question, harder or easier.

The Court: Objection overruled. You may answer the question.

(Testimony of Henry L. Foster.)

Mr. Conway: The Judge said you can answer the question.

The Witness: Well, it stands to reason a taller piece has got more lean than a shorter. [26]

Q. You mean on the dolly?

A. Yes, just like taking a load on a two-wheel truck, if you get heavy stuff on the bottom you got to pull harder to get it over. If you got a taller piece and it leans against your truck, it is easier to bring it.

The Court: To what specification of negligence does this question refer?

Mr. Conway: About the dolly tipping over.

The Court: You are talking about the size of the glass.

Mr. Conway: The size of the crate of glass that was on the dolly I asked him about, your Honor; they seem to have a variance.

The Court: Do you complain about the size of the load?

Mr. Conway: No, it is the way some of the crates, your Honor, affect the dolly. Some of them—I am trying to make it clear by this witness' testimony to the effect that a low, flat crate would tip off easier than a higher when—that was the purpose of the question, from the dolly.

The Court: Very well.

Mr. Conway: There was nothing wrong with the crate of glass itself, your Honor.

Q. Have you ever had any occasion, Mr. Foster,

(Testimony of Henry L. Foster.)

to know about any of these cases of glass falling off from the dollies before this happened?

A. Yes. [27]

Q. How long was this particular dolly standing there with this case of glass on it before the case fell over onto Mr. Macartney?

A. Oh, five or ten minutes.

Q. You do not know for sure how long it was?

A. No.

Q. It would be more or less? A. No.

Q. Was Mr. Macartney working on this particular operation of taking out glass the same as he had done that day before on other crates of glass that he and his partner moved out from the hatch?

A. Yes.

Q. I mean the method of his operation.

A. That is right.

Q. Just explain to the Court and jury how Mr. Macartney's partner would move out the glass from the place it stood on the deck in the ship out to the hatch.

Mr. Tatum: Excuse me; is that how he would or how he did?

Mr. Conway: How he did.

The Witness: Well, he would take the dolly and take it over to the piece of glass, tip the dolly up, and then push it under and then drag the whole glass, dolly and all, and the heavier piece of glass, a taller piece of glass would lean back [28] against the dolly harder than a shorter piece of glass.

(Testimony of Henry L. Foster.)

Q. All right, then, what did they do? What did they do after they got it on the dolly?

A. They wheeled it out to the hatch.

Q. Which way was it? Tell us.

A. Stand it up—that would be fore and aft, and they stand it up on blocks so they put a sling on it.

Q. When they got the dolly out to the square of the hatch, Mr. Foster, how would they stand it with respect to the dock?

A. It would be fore and aft of the ship, and it would be fore and aft of the dock so the sling would go on each end of it.

Q. In other words, it would be parallel with the dock? A. Yes.

Q. Is that the usual and customary way of doing this unloading operation? A. It is.

Q. You say you have done that yourself for many years? A. That is right.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Mr. Foster, is this about like what the hatch was at the time Mr. Macartney was hurt? [29]

A. Well, I will take a look.

(Witness examines sketch.)

Q. These red marks here are supposed to indicate a crate of glass? A. That is right.

Q. And the label "Dolly" is supposed to represent the dolly? A. Yes.

(Testimony of Henry L. Foster.)

Q. This is the square of the hatch?

A. Yes.

Q. This is forward and this is aft?

A. Right.

Q. This is the starboard side where the dock is, and this is the port side? A. That is right.

Q. Is that roughly the condition at the time?

A. Yes, that is about it.

Q. Were you standing over here where the——

A. There was a section of hatches on the aft, rear end.

Q. What do you mean, section of hatch?

A. Well, beams from that over there.

Q. Wasn't the hatch completely covered?

A. No, this is the deck above it here, and this glass was sitting on a deck below. Well, there was one set of hatches on this hatch (indicating).

Q. On the main deck? [30] A. Yes.

Q. On the shelter deck where you were working, this was all covered, wasn't it?

A. Yes, it was covered.

Q. The hatchboards were all in?

A. Where the glass was; that is right.

Q. Where were you standing, over here where these X's are?

A. Right in there (indicating).

Mr. Tatum: If your Honor please, could we open the depositions of all the longshoremen?

The Court: Open the depositions. Have you got a copy?

(Testimony of Henry L. Foster.)

Mr. Conway: It is all right to use a copy, your Honor.

Mr. Tatum: I will go to another subject and come back to this, if I may, your Honor. I drew this sketch according to what I thought the testimony was on the little sketch that we used at the time of the depositions, and that is attached to the original, and I had Mr. Foster down here (indicating); not up in here (indicating). That is the point I wanted to——

The Court: Go ahead. In the meantime we should be able to find the original depositions.

Q. (By Mr. Tatum): Mr. Foster, how big was this load that was on the blocks?

A. Well, it was a pretty high piece. I don't know. It was probably, oh, probably 10 or 12 feet long; about 9 feet [31] high. It was a tall load of glass.

Q. It was sitting on some blocks, was it not?

A. Yes, two blocks.

Q. So it was pretty high. You could hardly reach the top? A. It was; that is right.

Q. You were standing across the way?

A. That is right.

Q. How could you see what Mr. Macartney was doing?

A. Well, because we was at the corner of the hatch where we could see him standing there hanging on the piece of glass.

Q. You were——

(Testimony of Henry L. Foster.)

A. Let me show you something, Bub; you are all mixed up.

Mr. Tatum: I am the first to admit that, Mr. Foster.

A. Macartney was standing right there at this corner steadying that piece of glass, and this one was behind him, and he poked his head right out from the corner right here on this end.

Q. You have Mr. Macartney about here where I have an "R"; is that right?

A. That's right where he was.

Q. Not down here where this "X" was?

A. He was standing here, not where the "X" was. He was standing here on this end of the glass. He was standing right there (indicating). He was steadying that piece of glass.

Q. Was he standing up on the square of the hatch? [32]

A. On the square of the hatch when it fell over on him.

The Court: The original deposition ought to be marked for identification what number?

Mr. Tatum: Exhibit 26.

(Deposition referred to was marked Exhibit 26 for Identification.)

The Court: I think, Mr. Tatum, it might be desirable to remove the sketch from the depositions, and we will give it a different number.

(Thereupon, the sketch referred to was removed from the deposition and marked Defendant's Exhibit 26-A for Identification.)

(Testimony of Henry L. Foster.)

The Court: Give it to the witness.

(Document presented to the witness.)

Q. (By Mr. Tatum): This sketch marked Exhibit 26-A, Mr. Foster, at the top of it it has "Fwd." —forward? A. Yes.

Q. At the bottom it is "Aft," aft?

A. Yes.

Q. Over here on the lower right-hand side is an "X" marked "Walker." A. Yes.

Q. Is that where you were standing, Mr. Foster?

A. No, I was standing right up here (indicating). [33]

Q. You were standing up a little bit forward?

A. Yes, forward, right there, forward end of the glass there (indicating).

Q. Mr. Macartney was over here on the other side?

A. Yes, in there Macartney was (indicating), and this glass behind him right in there, you see, right the corner.

Q. Right where it says "Macartney"?

A. Yes, I was standing right across there (indicating).

Q. How long were you out on the dock after Mr. Macartney was hurt?

A. Oh, I don't know, I don't remember just exactly; not too long and quite a little while, too.

Q. Did any glass come out of the Hatch No. 4, while you were out on the dock? A. It did.

Q. Who was working that?

(Testimony of Henry L. Foster.)

A. Well, the boys down in the hold that worked with them.

Q. How many men came out of the hold to take care of Mr. Macartney? A. Two.

Q. You and who else?

A. Well, one guy rode the board out, and he went back on the ship, and I don't remember who it was. Then George Walker come out and went to the hospital with him after that, and they worked that glass. [34]

Q. As soon as you got Mr. Macartney out on the dock, the gang then started working on the glass again; is that right? A. They did.

Q. Didn't even wait for the ambulance to come?

A. Oh, they waited awhile for the ambulance to come, sure, but other gears was working the glass.

Q. Let's confine ourselves to No. 4, would you?

A. Okeh.

Q. Until the ambulance came, did you take any glass out of No. 4 between the time he was hurt and the time the ambulance came?

A. I don't remember whether they did or not, but I think they did.

Q. You think they did in No. 4. Now, first of all, how many hatches did the Wyoming have?

A. Well, five hatches on it.

Q. It is a five-hatch ship, you think?

A. Yes.

Q. How many of those hatches had glass in them?

(Testimony of Henry L. Foster.)

A. Well, there was the two forward had glass, I know, besides 4.

Q. Were they then working in No. 1 and No. 2?

A. Well, they was working No. 2, but I don't know about No. 1, whether it was 3, what it was—working two gears forward anyhow. [35]

Q. Well, were they working while you were on that dock? A. That they were.

Q. Were they unloading glass?

A. They were.

Q. So it must have been out of Hatches 1 and 2 or 3, two of those hatches?

A. Yes, two of the hatches.

Q. Was anybody working in the after hatch besides your gang?

A. No, it was empty; the after hatch was empty.

Q. No. 5? A. Yes.

Q. Are you sure there was not a No. 6 on this ship?

A. I don't remember whether it was 5 or 6. I don't think there was a 6.

Q. How many gangs were down there working the ship that afternoon?

A. Well, I don't know how many was there.

Q. How many gangs does it take to work a hold?

A. It takes, if you are a loading-out gang, it takes six men in the hold; and if you are discharging gang, it's eight men.

Q. But it is one gang to a hatch?

A. Yes, one gang to a hatch. If you got double gears, sometimes it is two gangs in a hatch. [36]

(Testimony of Henry L. Foster.)

Q. How many gangs were down there that afternoon that Mr. Macartney was hurt?

A. Well, I don't know how many there was forward. I think there was three gangs.

Q. Forward?

A. Three gangs altogether.

Q. Altogether?

A. I think so. I ain't sure. There might have been more.

Q. How long have you been longshoring, Mr. Foster? A. 38 years.

Q. You know most of the fellows who are working in the waterfront, don't you?

A. That's right.

Q. Could you tell me who the gang bosses were at the other hatches that day?

A. God, no, I couldn't tell you because every ship that you work on might work with different—

Q. Well, then, it might also be true that they were not unloading glass anywhere else, mightn't it?

A. They were unloading glass. I could see the glass from the pier. I know that.

Q. I thought you said you saw them bringing it out while you were there? A. I was.

Q. From Hatch Nos. 1 and 2 or 3? [37]

A. Yes, you could see it from the dock when I was on the pier.

Q. And were all of the gear, it was working simultaneously? In other words, the gear at Nos. 1 and 2 was lifting up and carying over and dropping down at the same time; is that right?

(Testimony of Henry L. Foster.)

A. Oh, not right exactly the same time. They don't time each other on a ship, the winch drivers don't, to take out a load. Sometimes they do, sometimes they don't.

Q. They take out a load when it is ready to come out, don't they?

A. That's right; that's right.

Q. It is very rare that all three of them would come out at the same time; isn't it?

A. Yes. It is possible.

Q. It is possible?

A. Sure, some gangs works a little faster than others.

Q. While you were down in the hold there with Mr. Macartney when he was hurt, you couldn't feel the ship list when he was hurt, could you?

A. You can't hardly feel it when you are working.

Q. So you didn't feel any movement at all just before he was hurt?

A. When you are in the hold of a ship, no.

Q. When you were out on the dock and you looked at the booms [38] that you say were moving as cargo was being worked, you couldn't guess how much they moved, could you?

A. No, you couldn't guess how much they moved.

Q. These dollies that you used that day are the same kind of dollies you have been using for many years, aren't they?

A. That is right.

Q. No different?

A. No, I guess they ain't.

(Testimony of Henry L. Foster.)

Q. After Mr. Macartney was hurt you continued unloading that same glass with those same dollies, didn't you? A. We did.

Q. And still are using the same kind of dolly today?

A. I think they made them a little bigger.

Q. A little bigger?

A. Yes, I think they made them a little wider, a little more slope to them.

Q. You mean longer this way (indicating)?

A. No, wider so that they will slope back more.

Q. Slope back more? A. Yes.

Mr. Tatum: That is all.

Redirect Examination

By Mr. Conway:

Q. When they have a dolly wider, Mr. Foster, is it easier [39] or harder to tip over when it has got a crate of glass on it?

A. It is harder for it to tip over.

Q. You say they made them wider since this happened? A. I think so. [40]

* * *

EDWARD M. THOMAS

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

Q. Will you please state your name and occupation?

A. Edward M. Thomas, longshoreman. [41]

* * *

Q. Where were you working on October 10, 1954, on the day that Mr. Macartney was hurt?

A. Well, I was working on the inshore side at the same hatch that Mr. Macartney got hurt in.

Q. On the Wyoming? A. Yes, sir.

Q. When did you start to unload this cargo of glass in No. 4 hatch that day?

A. It was in the afternoon.

Q. Whereabouts on the ship was this glass stored, Mr. Thomas?

A. It was stored in the after end of the Nos. 4 hatch or 5 hatch, if there was six hatches. It was the first hatch back of the superstructure in the after end, toward-ship.

Q. You say you were working on the inshore side? A. Yes, sir.

Q. What side of the ship was Mr. Macartney working? A. Offshore.

Q. How many dollies did you gentlemen have down there when you were working that afternoon?

A. Two.

(Testimony of Edward M. Thomas.)

Q. Mr. Thomas, that picture there, 3-B, is that the number? A. Yes.

Q. Is that the same type dolly that you were using that day? A. Yes. [42]

Q. How many of those did you say were down there on that deck you were working?

A. One on each side; two dollies.

Q. One on each side. Then would you please explain what method you used on your side to get the glass from the ship out on the deck of the ship where it was stored out to the hatch?

A. These dollies.

Q. About how many men were working on one dolly?

A. Well, all four men worked on the dolly at the same time. Sometimes it takes four men to tip one of those cases of glass up. It all depends on the height of it.

Q. Four men. Then when you were working on the inshore side of the hatch that day did you notice which way the deck was sloping as you were moving the glass out to the hatch?

A. You will have to come a little clearer than that.

Q. Can you hear me all right?

A. I can hear you, but I don't know what you want.

Q. Did you notice whether or not there was a slope to that deck?

A. There is always a slope on the deck of the Wyoming. She is built with a high center.

(Testimony of Edward M. Thomas.)

Q. How much of a slope did you notice that day when you were moving the cases of glass out to the hatch from your side of the ship? [43]

A. Oh, it was fairly steep.

Q. How was that brought to your attention? How did you know that?

A. Well, by the work you are putting out. It is harder to push the dolly uphill than down.

Q. You mean when you were pushing the glass out you noticed it? A. Yes.

Q. How many cases of glass had you fellows moved out on your side before this crash occurred?

A. There is no way of telling. I don't even know how many there were in the hatch to begin with. I don't count them. That is the checker's job.

Q. I know, Mr. Thomas, but would it be six or eight or so, or more, in there?

A. We had worked in there, oh, we had worked in there for awhile. I don't know how much. I guess we had taken out a half-dozen or more.

Q. Where were you when Mr. Macartney was hurt?

A. I was standing on the inshore side of the ship in the after end of the hatch. [44]

* * *

Q. Then where was Mr. Macartney at that time?

A. Standing at the hatch coaming by a crate of glass on the inshore side—offshore side, excuse me.

Q. That would be the opposite side from where you were? A. Right.

Q. Did you see the crate of glass fall on Mr.

(Testimony of Edward M. Thomas.)

Macartney? A. I did not.

Q. Do you know what Mr. Macartney was doing at the time the crate of glass fell on him?

A. He was leaning on another crate of glass.

Q. You mean in front of him?

A. It was in front of him, yes.

Q. I mean the crate of glass that he had hold of, was that [45] in front of him?

A. Yes, it was in front of him.

Q. Which way would Mr. Macartney be facing at that time? A. Towards the dock.

Q. Was there any person or persons near the crate of glass that was standing on the dolly behind Mr. Macartney? A. None.

Q. About how large a crate of glass was this, Mr. Thomas, that fell on Mr. Macartney?

A. Well, I would say it was about between 8 and 10 inches thick; maybe, oh, about 53 inches high, about 7 feet long, maybe 8, maybe a little longer. I have never measured it.

Q. Did the ends of the glass stick out over the ends of the dolly? A. Yes.

Q. About how far?

A. I don't know; I never saw that case on that dolly.

Q. In other words, you saw it after it was on Mr. Macartney; is that right? A. That is right.

Q. From the location of the crate of glass after it fell on Mr. Macartney, which way would the crate of glass be with respect to the dock? That is,

(Testimony of Edward M. Thomas.)

would it be facing, parallel to the dock? That is what I mean by my question.

A. Yes, it would be fore and aft with the [46] dock.

Q. Can you give the Court and jury an estimate of approximately how much of a slope there was to the deck of this ship at that time and before this crate of glass tipped? A. No.

Q. You cannot. Can you explain now from your recollection of how this ship was moored at the dock, I mean how it was tied?

A. Well, I never—again, that isn't my job to tie up that ship.

Q. All right. Well, do you know whether it was tied or not?

A. Yes; oh, it must have been or it wouldn't have stayed there if it had not been.

Q. Can you tell us, Mr. Thomas, approximately how much of an incline there would be on that deck from the square of the hatch to the wing and how many feet it would be from where this was moved out? A. Do you want approximately?

Q. Yes.

A. I couldn't do that unless I had the scale of the ship.

Q. Well, I mean was it 20 or 25 or 30 feet from the point where the glass was moved out to the square of the hatch?

A. Well, from where we were getting the glass out to where we was slinging it it was approximately, well, when we started in I would say maybe

(Testimony of Edward M. Thomas.)

we was moving it 14 feet to begin with. Then when we finished up we was yarding it out there 30 feet. [47]

Q. That is all I asked.

A. Because it was not stowed in the wings. It was stowed toward-ship clear across the hatch.

Q. Then how much of a slope was there to the deck in that distance; approximately how many inches?

A. That's the same question but at a different angle.

Q. I mean, in 20 feet——

A. Well, just a second; this isn't right, but the 20 feet that we were going was not from the wing in altogether. You are coming with the sheer of the ship to the hatch and then setting it on the side of the hatch. Just like this courtroom here, if you went back there to get a case, this courtroom had a list in it or tilted, we will say, you go back here and pick up a case, and you got to bring that out here before—you fight that uphill to get it back.

Q. That is what I am trying to find out.

A. Yes.

Q. Well, I appreciate your answer, Mr. Thomas, but what I am trying to find out and maybe I didn't make myself clear, I am trying to find out from the side of the ship to the square of the hatch, for example, would be approximately how many feet? Perhaps we can get that.

A. I would say it was around 18 feet. That is, to the hatch coaming, now.

(Testimony of Edward M. Thomas.)

Q. Yes, to the hatch coaming, and then in that distance [48] how many inches would the floor slope from the side of the ship to the hatch coaming?

A. Again I couldn't tell you because, without the scale of the ship, I couldn't tell you, and nobody else either.

Q. By the way, how long have you known Mr. Macartney?

A. Well, I have known him since 1941, 1942, around there.

Q. Was he able to do a pretty good job of longshoring before this happened?

A. When he wanted to.

Q. Did he have any trouble with either one of his legs before this happened?

A. No. When I first knew the man he was playing hockey. I knew of him.

Q. Did he get around in pretty good shape?

A. He swung a mean stick.

Q. After this accident happened, have you had occasion to see him working on the waterfront once in awhile?

A. Well, I seen him putting in his time.

Q. What difference have you noticed in the way Mr. Macartney gets around now since he got hurt than he did before this happened?

A. No comparison.

Q. What do you mean? Explain to the Judge.

A. He is an old man now.

Q. What? [49]

(Testimony of Edward M. Thomas.)

A. He is crippled. It is just like giving away your arm.

Q. What kind of work does he have to do since this happened when he started to work again?

A. He has to take jobs that comes off of what we call the "bunion board."

Q. What board?

A. B-u-n-i-o-n, "old man's board." Well, it is no living. Maybe if a man has to do it for a living he has to do it. That is all we call it, the bunion board for the men that is ready to retire or pretty near.

Q. I understand. In other words, the way the work of longshoring is set up here in Portland, maybe one month he could work quite a bit from that board, and maybe next month he couldn't work so much. Is that what you mean? A. Yes.

Q. Because the jobs would not be available?

A. That is right.

Q. That he could do, I mean?

A. That is right.

Q. That is right. All right, shortly after Mr. Macartney was injured did you yourself go up on the dock by the ship?

A. Yes, I was on the dock.

Q. Right after this happened when you were up there by Mr. Macartney while you were standing on the dock waiting for the ambulance, did you watch the ship? [50]

A. Well, when we was waiting for the ambulance I looked at the ship, yes.

Q. What did you see?

(Testimony of Edward M. Thomas.)

A. It had a definite list, inshore list.

Q. Did the ship move from time to time?

A. It did. They all do to a certain per cent.

Q. Was the gear on the ship working when the ship was moving? A. Yes.

Q. Which way did you say the ship was moving while you were watching it?

A. Well, it can't move one way all the way, so it has got to go back and forth.

Q. Well, explain to the folks and the Judge what you mean.

A. Well, when you take a case out of the hatch it all depends on the size and the weight and how much boom you got on the dock. When you take a case out of the hold and start for the dock with it, it will lean towards the dock. If you pick a load up off of the dock, it will lean towards the dock every time.

Q. Then the way the ship was moored, Mr. Thomas, with the lines that secured it, how far could it go the other way towards the river?

A. Again, I didn't see—I didn't check the lines. That is out of my line. I don't tie ships up. I just work them. [51]

Q. Could you tell while you were standing on the dock approximately how much of a list there was to the ship? A. No.

Q. Was this particular ship what is known as a tender ship at that particular time?

A. Well, you could say that, I guess, yes.

(Testimony of Edward M. Thomas.)

Q. Just explain what that term means on the water front?

A. Well, a tender ship usually means, usually is a ship that has not sufficient cargo weight, in other words, in the lower holds to what it has in the shelter deck or 'tween deck.

Q. Then what does that condition make the ship do?

A. Top-heavy. Oh, excuse me, you said "do"?

Q. Yes, what does it do when it is that way?

A. Well, it makes that tender.

Q. How long did you stand on the dock and notice that listing you mentioned?

A. Not very long.

Q. Before Mr. Macartney was taken away by the ambulance?

A. Not very long after the ambulance come I went right back to work.

Q. Would that be a few degrees in extent, this list?

Mr. Tatum: If your Honor please, I object to that as leading, in the first place. In the second place, the man has answered he cannot estimate it. [52]

The Court: He has answered it three or four times, Mr. Conway. He is your witness. You cannot put words in his mouth.

Mr. Conway: All right; you may inquire.

(Testimony of Edward M. Thomas.)

Cross-Examination

By Mr. Tatum:

Q. Isn't it true, Mr. Thomas, that all ships work a little bit in the water as they are being unloaded when they are tied up to a dock?

A. All ships?

Q. General cargo ships such as this unloading general cargo?

A. We will answer that by saying some do.

Q. You recognized that this ship was working back and forth as cargo was being loaded or unloaded before Mr. Macartney was hurt; did you not?

A. I did not.

Q. You noticed it while you stood on the dock after he was hurt? A. I saw—yes, I did.

Q. Then you went back to work in the same hatch unloading the same cargo in the same way, did you not? A. Yes.

Mr. Tatum: That is all. [53]

Redirect Examination

By Mr. Conway:

Q. How much cargo was there remaining to be unloaded, Mr. Thomas, after the accident happened, this glass cargo in that particular hatch?

A. Oh, again I don't know how much was in there. Maybe 20 cases; maybe 20 cases.

Q. Do you remember about what time you got through working that afternoon after this happened? A. I do not.

(Testimony of Edward M. Thomas.)

Q. What time did it happen, by the way? Do you remember what time it happened?

A. No; I do not. I don't watch the clock that fast. They have got men to tell me when to quit.

Q. It was a little bit after lunch, wasn't it?

A. That is right.

Mr. Conway: That is all.

Recross-Examination

By Mr. Tatum:

Q. Mr. Thomas, isn't it true that you came to work in that hatch at 1:45 in the afternoon?

A. I don't know.

Q. Do you know whether or not you continued working there until 6:00 p.m. in the same [54] hatch?

A. I am pretty sure we did. That has been a long time ago.

Q. Is it not true that Mr. Macartney was hurt at ten minutes after 2:00 in the afternoon?

A. If that's what you have got wrote down there, that's it.

Mr. Tatum: That is all.

(Witness excused.) [55]

JOHN RAANES

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. * * * Now, how long have you been longshoring?
A. Oh, 25, 26 years.

Q. Have you worked in all departments?

A. I wouldn't say in all of them. I have not been driving winch.

Q. You have worked in quite a few of them?

A. Well, yes.

Q. Where were you working on October 10, 1954, on the day that Mr. Macartney was hurt?

A. When Mr. Macartney was hurt I was working partners with Mr. Macartney. [56]

Q. What ship was that?

A. Well, as I recall it, it was the Wyoming.

Q. About when did you start to unload this cargo of glass in No. 4 hatch that day?

A. I don't remember the time.

Q. Was it before or after lunch?

A. As I recall, it was after lunch.

Q. Where was this glass stored on the ship?

A. It was stored in the after end on No. 4 hatch across-ship.

Q. Were you and Mac working on the inshore or offshore side of this hatch?

A. On the offshore.

(Testimony of John Raanes.)

Q. How many dollies did you have working on your side? A. We had one.

Q. Would you take that picture, Mr. Bailiff, and show it to him, the dolly?

(Exhibit presented to the witness.)

Would you take a look at that and see whether that is the same kind of dolly you were using that day, Mr. Raanes?

A. Yes, that looks like it. That looks like the type.

Q. That is the same one we were talking about when we had these depositions taken some months ago. Will you please explain the manner of moving these crates of glass from the [57] hold to the square of the hatch that you and Mr. Macartney did?

A. Well, you take that dolly, take it back to the crates of glass. You tilt up the back of the dolly to get the prongs in front of the dolly and underneath the box, tilt the box and the crate back so it comes back on the four wheels again, and then we ride them back to the hatch—push them back, rather.

Q. You were Mr. Macartney's working partner that day? A. Yes.

Q. How many crates of glass had you and Mr. Macartney moved from inside the ship there out to the square of the hatch before this accident happened on that occasion?

A. That I don't know; that I don't remember, how many.

(Testimony of John Raanes.)

Q. Well, would it be more than five or six?

A. I couldn't say. I couldn't say how many there would be. We put in a little time down there, and we got fairly busy, but I don't know how many we took out.

Q. You had been moving some of them out?

A. We had been moving some, yes.

Q. How long had you been doing this that day before the accident happened? A. How long?

Q. Yes; after the lunch period.

A. I don't remember how long it was. [58]

Q. When you moved the dolly towards the square of the hatch from where the cargo of glass was stowed, did you have to push the dolly uphill or downhill on the deck?

A. We were pushing downhill so we had easy going.

Q. Approximately how far was it from where you moved these cases of glass out to the square of the hatch from where they were stowed?

A. In that particular case I would judge it was about 30 feet coming forward to abreast of the hatch, and then in towards the hatch a few feet, I would say about 30 feet.

Q. Now, then, in what direction was this deck you were working on sloping when you moved all these other cases of glass and also when you moved the one that fell on Mr. Macartney?

A. It was sloping towards inshore.

Q. That would be towards the dock?

A. Yes.

(Testimony of John Raanes.)

Q. Approximately how many inches of slope was there from the river side of the ship to the square of the hatch? A. That I wouldn't know.

Q. Which way was the ship moored at the dock in the Willamette River?

A. Which way? It was heading upstream.

Q. Do you know how many lines the ship had fastened to her at the time when you were working on board? [59]

A. No, sir; that I haven't got any idea about.

Q. How long had this slope or list in the ship been existing before this accident happened that day?

Mr. Tatum: I object to that. He has testified as to a slope; not as to a list.

Mr. Conway: Well, it is all the same thing, your Honor.

Mr. Tatum: I object. It is not.

The Court: Use the word "slope," how long had——

The Witness: Is that the question?

The Court: Yes.

The Witness: Well, I noticed it all morning.

Q. (By Mr. Conway): What did you say, Mr. Raanes?

The Witness: I noticed that list or slope, whatever you call it, I noticed it all morning.

Q. All morning? A. Yes.

Q. Was this an inshore list? A. Yes, sir.

Q. When you and Mr. Macartney got over to near the square of the hatch with this crate of glass

(Testimony of John Raanes.)

on this dolly which later fell on him, how did you leave the dolly with the crate of glass on it standing when you left it after you got near the square of the hatch?

A. We left it standing on the dolly, and it was facing the hatch, parallel with the hatch. [60]

Q. The crate would be parallel with the sheer?

A. Yes, sir.

Q. Did you leave the crate of glass on the dolly?

A. Yes.

Q. Then what did you do after you did that yourself?

A. When we got up there and set the dolly there, I noticed that there was only one man out in the hatch tending to the slings that come in. I couldn't see them yet, but they were coming in, and so I left Macartney and the dolly and walked over to the hatch to help with the sling and sling the case that was already on the hatch.

Q. You were getting ready to have a sling come in, were you? A. Yes.

Q. Did you have a crate of glass out in the hatch?

A. There was a crate of glass in the hatch, yes.

Q. How far ahead of this one crate that was on the dolly was the one that was in the hatch?

A. Well, I didn't measure it. I would say about five feet or so, possibly something like that.

Q. How was it standing out in the hatch?

A. The crate that was on the hatch?

Q. The crate that you were hooking up.

(Testimony of John Raanes.)

A. That was standing on two blocks.

Q. On some blocks? [61]

A. Yes, so we could get the sling there.

Q. How big a case was that, Mr. Raanes?

A. That, again, I didn't measure it. I do know I was standing alongside of it, and I had my hand about like that on top of it (indicating).

Q. Was it a taller case than the one that fell on Mr. Macartney?

A. Well, I think it was just a little taller, yes.

Q. What were you doing in connection with the case that was in the square of the hatch just before the accident occurred?

A. We were getting the sling on the case, and the sling was coming in, and I got hold of one sling, and a man on the other end of the case got hold of the other sling, and we were both trying to slip it on.

Q. What was Mr. Macartney doing at that time?

A. Well, I had maybe more or less my back to him; not the back, the side. I was facing aft on the ship, and Macartney would be on my right. I didn't see the crate or the dolly nor Macartney when he was at the dolly.

Q. I forgot to ask, by the way, what kind of a deck was that you were working on moving this glass forward near the square?

A. Steel deck.

Q. Was it rough or smooth? [62]

A. Oh, fairly smooth. It was dented and a little

(Testimony of John Raanes.)

rough underneath, so it was a little rough, I know by that.

Q. What kind of wheels did the dolly have?

A. As I recall it, it had rubber wheels.

Q. How long was Mr. Macartney near the crate of glass in the square of the hatch with his back to the crate of glass that fell on him before the crate fell upon him that day?

A. I don't know how long he was there. I just happened to see him sort of cornerwise just a little while before the crate crashed on him, possibly, I would say, a couple of minutes.

Q. Was there anybody except Mr. Macartney in the position you have mentioned near the dolly or the case of glass on the dolly at that time before it fell?

A. Well, of course, I didn't see back there. I didn't know of anybody back there.

Q. Were there any cables or lines attached to it or that hit it in any way that would cause it to fall?

A. No, sir.

Q. About how much did that crate of glass weigh that fell upon Mr. Macartney?

A. Well, about I would say around 1,500; possibly a little more.

Q. 1,500 pounds? A. Yes, sir. [63]

Q. Do you remember about what size that particular crate was?

A. Well, approximately, about 10 inches thick, about 4 feet high, and I should judge 7 or 8 feet long.

(Testimony of John Raanes.)

Q. Was the dolly with the crate of glass on it standing all by itself before the crate of glass fell off of the dolly and onto Mr. Macartney at that time?

A. Well, I assume it was. As I say, I didn't see it. I didn't see it when it crashed. I left it——

Q. Immediately afterwards, did you see anybody there besides him? A. No, sir; no one.

Q. You would have if there had been, wouldn't you? A. If——

The Court: I think that is argumentative. Go ahead.

Q. (By Mr. Conway): Which way was Mr. Macartney facing at the time this crate fell on him?

A. He was facing the dock.

Q. How did it fall on him? A. How?

Q. Well, I mean what position was the crate on him when it hit him?

A. Well, it apparently hit him right across the legs below his knees and took him along down.

Q. What position was he in when the case stopped falling? [64]

A. I would say he was practically sitting on it. He couldn't fall forward because the other crate was in his way. The only way he could was to fall backwards on top of the crate that hit him, but he was more or less hanging on.

Q. Where were his legs?

A. Underneath the crate.

Q. How many men lifted that off him?

A. Well, that I don't know, if they were all

(Testimony of John Raanes.)

there or not. I never looked around. Whoever was there, we grabbed hold and lifted it off. If they are all there, I don't know.

Q. About how long have you known Mr. Macartney?

A. Well, I would judge somewheres in the '30's. I don't remember when first I met him.

Q. Was he able to do a pretty good day's work longshoring before this happened, from your observation?

A. I worked with him several times, and he was a good worker.

Q. Did he have any trouble with either one of his legs before this accident happened?

A. Not that I could observe.

Q. He got around in pretty good shape?

A. He got around good.

Q. After this accident occurred, have you had occasion to see him working on the waterfront once in awhile?

A. No, I haven't, because I work in the hold as a rule, and [65] he worked in the dock after he was hurt. He doesn't come down in the hold. At least I didn't see him down in the hold.

Q. You say you have been working in the hold most of the time yourself?

A. Yes, sir.

Q. Have you had occasion to see Mr. Macartney since his accident, occasionally?

A. Oh. I see him walking along on the dock; yes, sir.

Q. What difference have you noticed in the way

(Testimony of John Raanes.)

Mr. Macartney gets around now at the present time, since he got hurt, and before this happened?

A. Well, he gets around rather poorly. [66]

* * *

Q. Did you gentlemen finish unloading the cargo that day of glass?

A. I don't even remember that.

Mr. Conway: All right; you may inquire.

Cross-Examination

By Mr. Tatum:

Q. Have you seen this sketch, Exhibit 27, Mr. Raanes? Can you see it from there?

A. Yes, I can see it.

Q. I have got marked up there at the top of the crate which is on the blocks an "R." Is that about where you were standing when Mr. Macartney was hurt?

A. Well, I don't quite get that.

The Court: Show it to him.

(Exhibit presented to the witness.)

The Court: Where is the hatch?

The Witness: Where is the crate there?

Q. (By Mr. Tatum): The crate is the red box there, and the crate on the dolly is the red box.

A. And the forward end of the ship is up?

Q. At the top; that is correct.

A. Well, then, you have that—I was in the—yes, I was in the forward end of the hatch. That is right.

Q. Was Mr. Macartney about where the black "X" is when the [67] load of glass fell on him?

(Testimony of John Raanes.)

A. Do you have that right there? I am afraid I don't get that drawing correctly.

Q. You have been sitting in the back of the courtroom and have not been able to see it. This is the port side of the ship, the offshore side. Here is the starboard on the dock side. This entire area represents the square of the hatch from coaming to coaming, from bulkhead to bulkhead, this square of the hatch. A. Yes.

Q. Covered over with hatchboards.

A. That is right.

Q. And the black things here are the blocks upon which you rested loads to be taken out?

A. Yes.

Q. These things are supposed to represent the dollies? A. Yes.

Q. And the red box-like affair is supposed to be a crate of glass? A. A crate of glass.

Q. You remember last December when Mr. Conway and I took your testimony here in the courthouse? A. Yes.

Q. It is my recollection that you said that you were standing up here where this "R" is. [68]

A. That is correct, in the forward end of the hatch.

Q. In the forward end of the hatch, putting the sling around the forward end of that load?

A. Yes, that is correct.

Q. And somebody else whom you didn't remember, another man of your gang that I have marked with a "3" down here was putting a sling around

(Testimony of John Raanes.)

the after end? A. Yes, that is right.

Q. And Mr. Macartney, when you went up to put a sling around the forward end, wasn't he standing here holding onto the load that was on a dolly?

A. When I left him he was still hanging onto the loading dolly.

Q. Then you went up and brought the slingload around? A. That is right.

Q. You didn't see what he did except out of the corner of your eye you saw him come up, and then you heard the load fall on him?

A. That is right, Macartney came up to the box. He had his hand on the crate on the hatch.

Q. Then the load fell on him from behind?

A. That is right.

Mr. Tatum: That is all. Thank you.

(Witness excused.) [69]

FRANK DeFRANCISCO

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. How long have you been doing work as a longshoreman? [70] A. Oh, the last 12 years.

Q. Have you worked in all departments?

A. Practically all of them.

(Testimony of Frank DeFrancisco.)

Q. Where were you working on October 10, 1954, on the date that Mr. Macartney was hurt?

A. On the Wyoming.

Q. About when did you start unloading this cargo of glass in No. 4 hatch that day?

A. It was shortly after 1:00 o'clock.

Q. Whereabouts was this glass stored on the ship?

A. After end of the ship.

Q. Whereabouts were you working yourself on that occasion?

A. Inshore side.

Q. Where was Mr. Macartney working?

A. Offshore.

Q. On the same deck?

A. Yes.

Q. How many dollies did you gentlemen have on your side, and how many did Macartney have on his side?

A. Well, I know we had one in our side. They had one on theirs, I believe. Well, they would have to have one to work.

Q. Mr. Clerk, would you show the gentleman the pictures over there, beginning with 3-B?

(Exhibit presented to the witness.) [71]

Does that look like that dolly that you were using that day?

A. Yes, that's a glass dolly.

Q. When you were moving the glass from your side of the ship up to the square, did you notice whether or not there was any slope on the deck?

A. Yes, there was a slope on the deck.

Q. Was that existing all the time you were working that day before this accident happened?

(Testimony of Frank DeFrancisco.)

A. Yes.

Q. How long had you been working before this accident happened?

A. Oh, I couldn't give you an approximate time. We had uncovered at 1:00 o'clock and went down into the hatch, and it might have been probably about, oh, close to 2:00 o'clock; somewhere in there.

Q. You mean it was about 2:00 o'clock when this happened?

A. I think it happened a little after 2:00. I am not quite sure. Nobody kept time on that.

Q. That is all right, just approximately.

Was Mr. Macartney working with somebody else on the other side?

A. Yes, he was working with the three other men on the other side. There is four men to a side on discharge.

Q. Do you know about how many crates of glass had been moved [72] out on their side before this accident happened?

A. No, I don't keep track of that. All we are down there for is to move the cargo.

Q. Did you see Mr. Macartney just before this accident happened when he was out there near this crate of glass that was in the square of the hatch?

A. No, I can't say I did. We had just moved a crate, and they had taken it out, and we was going back for another crate with our dolly and didn't pay much attention to what they were doing on their side.

Q. When did you first know about the accident?

(Testimony of Frank DeFrancisco.)

A. Well, I heard a yell, and Mr. Macartney let out a yell, and I turned around and see the glass on him, dashed over, picked it up and got him out from under it.

Q. How far away were you from him when you heard him holler?

A. Well, probably 15, 20 feet.

Q. That would be on the inshore side?

A. Inshore side. We had started back. We hadn't quite got back to the glass when we heard a noise, heard him making a noise, and turned around and started over to pick the glass up. [73]

* * *

Q. Where had you been working that day before you worked this hatch?

A. We were working back in 5.

Q. What had you been taking out of there?

A. Well, it was—I think we had some nails, kegs of nails, wire, some steel products.

Q. Steel and wire? A. Yes.

Q. Was the hatch empty or loaded when you got through?

A. Well, the hatch, right in where we were working when we left it was fairly empty. There wasn't much cargo in there.

Q. Then what was the situation below the deck in the hatch you were working on? Was that loaded or empty? A. It was empty.

Q. When that condition exists on a ship that you are working on, what takes place? What happens?

(Testimony of Frank DeFrancisco.)

A. Well, if the hull is empty and you have more weight above, it makes it bob a little more. It is a little crankier. [75] The ship is a little crankier.

Q. At any rate, it makes the ship crankier?

A. Well, we call it cranky. When you hoist anything out, it will rock a little more than usual. If you have more in the bottom of it, it is a little more stable, not quite so rocky.

Q. You mean it rolls back and forth; is that what you mean?

A. Well, yes, a ship rolls with the motion of the water, and hoisting of cargo back and forth will make it move.

Q. That deck there, what kind of a deck was it where they were moving the crates of glass?

A. Steel deck. They are steel ships.

Q. Was it rough or smooth?

A. Well, they are fairly smooth.

Q. Was this condition of listing you have mentioned existing all the time before this happened after you started working that hatch?

A. Well, on most of your ships there is usually a little list inshore. When you put your booms out, these big booms, they set out over the dock onto the dock there, and you have a little extra weight. It throws it off a little off-balance, and so that gives it a little permanent list all the time.

Q. What happens when you take a 1500-pound case of glass out on a boom over the dock? Then what happens?

A. It will move a little bit. [76]

(Testimony of Frank DeFrancisco.)

Q. Which way?

A. Any time you come out onto the end of a boom, get that weight moving, it will move a little bit.

Q. Which way will it list, then?

A. It will list inshore, the booms inshore.

Q. Does that happen whenever you get a heavy piece of cargo on the end of the boom?

A. Yes, it will.

Q. Was there another hatch working that day besides this one you were working?

A. Yes, there was one hatch working.

Q. Which way was Mr. Macartney facing at the time this crate of glass fell on him?

A. I don't know; I couldn't tell you which way he was facing when it fell on him, but when we went over to pick him up he was laying flat on the deck. He would be facing inshore. When we picked the glass up, he was facing inshore.

Q. How long have you known Mr. Macartney?

A. Well, probably about, around eleven or twelve years.

Q. Was he able to do a pretty good day's work longshoring before this happened?

A. Yes, he was quite active before this happened.

Q. Did he have any trouble with either one of these legs before this occurred?

A. Not that I know of. [77]

Q. Could he get around in pretty good shape?

A. Yes; like I say, he was quite active.

(Testimony of Frank DeFrancisco.)

Q. After this accident happened, have you had occasion to see him occasionally? A. Yes, sir.

Q. What difference have you noticed in the way he gets around now since he got hurt than he did before this happened?

A. Well, he has slowed up quite a bit.

Q. In what way?

A. Well, he don't walk as fast or quick, and he can't lift. I had him on several jobs where he has worked for me—well, let me explain that a little different now. I am what they call a casual walking boss, and I have gangs that work for me, you know, I supervise the work, and I have had Mac several different times working under my supervision.

Q. Since this occasion, since this accident happened what have you noticed about his work?

A. Well, he can't lift too much. You get anything that is heavy, he can't handle it.

Q. You mean he has to have the easier kind of jobs now?

A. That's right. I don't think he works in the hold of the ship any more.

Q. What board does he work off at the hall; do you know?

A. Well, he works off what they call the old man's board or bunion board. [78]

Mr. Conway: You may inquire.

(Testimony of Frank DeFrancisco.)

Cross-Examination

By Mr. Tatum:

Q. In your experience on the water front, Mr. DeFrancisco, isn't it true that all ships while they are being loaded or unloaded work a little bit in the water back and forth?

A. Usually they do rock back and forth.

Q. Not only by cargo but a passing ship might make it go?

A. Yes, that is right; it will bob.

Q. It is something that you experienced long-shoremen are aware of? You know about it?

A. Yes, I know about it.

Q. And in your loading or unloading operations you always take that into account on how you are working, do you not, that the ship is going to be moving a little bit?

A. Well, yes, if you put it that way, it is something—when you work on a ship like that there you get used to that movement, and it's just like working out here on the floor, it don't bother you. It don't actually bother you in any way.

Q. Do you remember what size of crate it was on this dolly that fell on Mr. Macartney?

A. It was a low one. It was not very high, approximately so (indicating). [79]

Q. A short, squat, heavy case?

A. That is right.

Q. Did you work with glass before with these

(Testimony of Frank DeFrancisco.)

kind of dollies, before this accident? A. Yes.

Q. Isn't it true that when you are working with a short, squat and heavy case that you have to hang onto the glass all the time to keep it from falling off, you as longshoremen, I mean?

A. Well, no, you don't have to hang onto it all the time. If you are pushing it and if you push on a downhill slope, you have to hold it or it will tip over, but if it is sitting still it won't fall, if it is level.

Q. But you do not dare let go because as soon as you let it go it will start dropping; isn't that right? A. Well, if it is on a tilt, it will.

Q. If there is this constant movement on a ship, the rocking back and forth that we have talked about, you conduct your work accordingly to protect yourself, don't you? A. That is right.

Q. You have to? A. That is right.

Q. And if the thing is going to move you can't expect it to stand still, can you?

A. Well, that would depend what your balance was on whatever [80] you have there. If you have a big crate there, it will stand—it would have to take an awful list to roll a big crate over.

Q. So you are just going to stay there and hold a dolly; isn't that right?

A. Well, that's right, it would. If it is a real tippy one, you have to stay there.

Q. And hold onto the dolly? A. Yes.

Mr. Tatum: That is all.

(Testimony of Frank DeFrancisco.)

Redirect Examination

By Mr. Conway:

Q. These dollies that you had been moving a case of glass over before this happened, Mr. DeFrancisco, as I understand, there were several cases of glass moved over from Mr. Macartney's side before this happened; that is right?

A. That is right.

Q. Was there any difference in the method of operation of moving these other cases of glass up to the square of the hatch and taking them than there was for this particular one? A. No, not——

Q. It was all the same, wasn't it?

A. The procedure is all the same. It is just the difference of the size of the case. [81]

Q. Is that the usual and customary manner of moving that particular kind of cargo?

A. Yes, it's the easiest way, getting it out with them dollies.

Q. It is also customary for the longshoremen to just have a dolly sit with a case of glass on it and then leave it sitting all by itself like this one was and then hook up another one in front of it and go out?

A. Yes, we have. It all depends on the way we are working. Sometimes we are pushing a job a little harder working—you know what I mean—a little faster, something like that, and we do occasionally take a load of glass and leave it there and

(Testimony of Frank DeFrancisco.)

go back after another one. I don't know just the way you set a pace of work.

Q. I mean that's what they were doing, the boys, that day?

A. Well, I imagine that's what they had done at the time because they had one load out there, and they had the other one on the carriage bringing it down.

Q. Isn't that the way you unload the glass right along?

A. Well, I would say—well, I don't know now, on our side when we were working we were just bringing one out at a time. Just like I say, we had already set one out, and we were going back for another one that—well, once in awhile they will play around and wrestle another one up before you get rid of one, something like that, they will load up. [82]

Q. I mean, you did either way; isn't that right?

A. That's right; it all depends who you have you are working with. If they are a little quick on doing something, why, they——

Q. Was there any cables or gear near or attached to this case of glass that fell on Mr. Macartney before it fell on him?

A. No, there was nothing but the crate of glass on the dolly.

Q. Was the dolly and the crate of glass standing by itself?

A. That I don't know. I wasn't paying any attention to it.

(Testimony of Frank DeFrancisco.)

Q. I mean, right after it fell you didn't see anybody there, did you?

A. No, Mr. Macartney was under the glass hurt, and the other fellows were still holding onto the sling at the time it happened.

Mr. Conway: All right; that is all.

Mr. Tatum: That is all.

The Court: I want to ask you something. Did you say that this work was being done in the usual and customary way?

The Witness: That is right.

The Court: Was the use of dollies the usual and customary way of taking out this glass?

The Witness: Yes, it is with these cases of glass. Did [83] you see that picture of it? It has four wheels and a little plate at the bottom, and you take this up to a crate of glass standing up, and you tip the glass over a little bit, slip this deal under the edge, and you slide your box back on top of it, and that eases it down to the ground on all four wheels, which leaves it all free, and you push it about wherever you want to push it.

The Court: That is all.

(Witness excused.) [84]

HOWARD L. CHERRY

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Conway: [85]

* * *

The Court: His qualifications are admitted.

Mr. Conway: All right, your Honor; very well.

Q. Doctor, when did you first treat Mr. Macartney?

A. In regard, as to his legs or other injuries?

Q. In regard to his injuries that he received on October 10, 1954.

A. I first treated him at St. Vincent's Hospital immediately following his admission on October 10, 1954.

Q. As part of your work, Doctor, have you had experience in taking and reading X-ray pictures?

A. I have X-ray pictures taken for me and then read them, yes.

Q. About what time was it that you saw Mr. Macartney at the St. Vincent's Hospital on October 10, 1954?

A. I may be able to get the time from a chart. I do not have it in my notes here.

Q. Would you hand him the hospital records?

(Documents presented to the witness.)

The Witness: He was admitted at 3:00 o'clock

(Testimony of Howard L. Cherry.)

in the afternoon, and I saw him very soon thereafter.

Q. What did he complain of at the time you first saw him? [86]

A. At the time he came in he had two severe compound fractured legs with the bones sticking out through the skin on both sides.

Q. Was he suffering any pain when you first saw and examined him? A. Yes.

Q. What did you then do, Doctor?

A. We treated him for pain and got him in shape and took him to surgery and operated him on the same day that he came in.

Q. About what time did you perform an operation?

A. The anesthetic was started at five minutes after 4:00, and we operated for about an hour and a half following that; finished at 5:45.

Q. Then just explain briefly to the jury the nature and type of operation that you did for him.

A. The fractures involved both legs below—between the knees and the ankles, and each side was—had several different fragments, and there were large wounds in which the bone was sticking through the skin on each leg. These were treated by surgically cleaning both legs and then reducing them, that is, putting the bones into their approximate proper position and then fixing them in place with what we call a Lottes intermedullary rod. One of these we placed in each leg. [87]

(Testimony of Howard L. Cherry.)

Q. How large is a rod? Have you got one there handy?

A. I brought a sample with me. The diameters are the same as this. The lengths vary according to the demand.

Q. What would the approximate length of that be, Doctor, that rod? A. Pardon me?

Q. What would the approximate length of that rod be?

A. This particular rod is 11½ inches.

Q. Is that about the same type and size rod you placed in each leg of Mr. Macartney?

A. It is the same diameter, and I believe that the rods that we used are a little longer than this.

Q. How large diameter is the rod that you placed in his leg?

A. This is three-eighths-inch.

Q. Is that the same size you put in his leg?

A. Yes, same diameter.

Q. What is that made of, Doctor?

A. Stainless steel.

Q. Is that supposed to last as long as the man lives?

A. It ought to last as long as the man lives, surely.

Q. Then does he have one of those particular type rods in each leg now?

A. There is one in each leg; that is right.

Q. Where do they begin and where do they end, Doctor, in [88] each leg?

A. It is inserted just below the knee, and it runs

(Testimony of Howard L. Cherry.)

down within the medullary canal or the marrow canal to just above the ankle so it does not involve either the ankle or the knee but threads the bone fragments over it.

Q. Is that on the front part or back part of the leg that rod is inserted?

A. It is inserted from the front and goes right down the middle of the tibia or the big bone in the leg.

Q. Explain to the jury what you mean by the tibia?

A. There are two bones extending from the knee to the ankle. The tibia is the larger and the much more important one as far as function and weight-bearing goes, and he fractured both the tibia and the fibula on both sides, and many fragments. The only one that we fixed is the tibia because it bears by far the greater portion of the weight, and the fibula will heal if the tibia is held at proper position.

Q. Did you also take X-rays on that occasion, Doctor; that is, cause them to be taken before you operated?

A. Yes; we had X-rays taken before we operated, during the operation, and many since.

Q. Do you have those X-rays with you now that the custodian of records brought from the hospital?

A. Yes.

Q. Would you please stand by the viewbox there and show the [89] jury and explain what they show and when they were taken.

(Testimony of Howard L. Cherry.)

A. This X-ray says "St. Vincent's Hospital." It is dated 10-10-54. It has his name written, Walter Macartney. This is his left leg, the ankle being at the bottom here and the knee-joint you can barely see here. The view on my left is looking straight ahead. The film is put behind the leg, the X-ray machine in front, and the picture is taken straight through. It shows a fracture of the tibia at this level (indicating) and of the fibula slightly higher with extra fragment present here (indicating).

Now the other film is also his left leg, and it is taken with the X-ray machine at the side and the film on the inner side, and it shows the same thing. There is another thing to be noted. The skin line comes right along here, and you can see from this film that a big portion of the bone is protruding through the skin.

Q. Doctor, was that X-ray taken before operation?

A. This was taken before the operation, yes.

Q. On the same day he came in?

A. That is correct. The last film was Exhibit No. 7-C. The film I am about to show is Exhibit No. 7-D. It has a marker as part of the film and is dated 10-10-54, St. Vincent's Hospital, and has the name Walter Macartney on it. This shows his right leg. This is an AP, or taken forward-backward as the last one was. It shows a complete fracture [90] at this level with some fragments and a second fracture about three inches below the knee and also that this main fragment is split for most of the

(Testimony of Howard L. Cherry.)

distance. The same thing is seen on the lateral view. That is an X-ray taken through from the side and shows the fracture at the junction of the middle and distal third or middle and lower third and also the upper portion, and again shows this upper fragment split for about half its distance, and again this one is compound at the side of the lower fracture but not above. By the term "compound" you mean that the bone is protruded through the skin, exposed through the skin.

Q. Doctor, show the jury on there while you have the picture in front of you where you placed those rods you mentioned.

A. I can show on the next film the rod in place.

Q. By the way, what was the name of that film you are just talking about that you just got through with?

A. I gave the number there.

Q. Thank you, Doctor.

A. This next film is Exhibit 7-E. The next two films are taken from the hospital while he was still in on the first occasion and just represents some follow-up films. Many of them, they are much alike. This one is dated 11-8-54, St. Vincent's Hospital, and has the name of Walter Macartney on it. This shows the rod in place on the left leg. The knee is just at the top of the film, and the rod is inserted [91] from the front through a hole drilled in the bone and then threaded through the canal of the tibia to hold it in place. This shows the lateral view looking at it from the side. This shows it in the anterior-posterior view, and the rod down the center

(Testimony of Howard L. Cherry.)

of the bone is what holds the fracture in place. The next one is 7-F.

Q. What was the date of that last film, by the way, Doctor?

A. The date of this film is 12-28-54.

Q. The one you just got through talking about?

A. That one was 11-8-54.

Q. Thank you.

A. We could get these the same day. It does not matter particularly. This shows the same thing on the right leg in which the rod is placed above the upper fragment down through the main middle fragment and across the second fracture and through the lower fragment so that it is threaded on both of the fractures to hold them in place. You notice that we disregard the fracture of the small bone. If we hold the big bone, the small one will be all right.

These two films are late films. This one was taken in my office under my direction. The date is 11-16-56, and it is Exhibit 7-B. This is the left leg, and it shows the rods still in place. It shows solid healing by the fracture site of both the tibia and the fibula.

Q. Does that also show the rod in there? [92]

A. Yes, this shows the rod in place.

This is Exhibit 7-A, which is his right leg. It again shows the rod in place, shows the fracture solid, all fractures solid and two fractures of the tibia and a fracture of the fibula, with rods.

Q. The date of that film, Doctor?

(Testimony of Howard L. Cherry.)

A. The date of this one, I guess it, I can't make it out. It is August or September of 1955. Again, there are many films, and we could select any other date. The edge of the marker is off of this, but it is either the 8th or 9th to indicate August or September, 1955.

Q. Would the conditions be the same anyway?

A. Yes.

Q. What is the purpose, Doctor, of putting a rod of that type into these particular legs of this man?

A. This is a relatively new method of treating fractures especially in the tibia, and the purpose is to hold the fractures in their proper position, and he is, I feel, very fortunate in having had these. I feel it has cut his convalescence time and his ultimate result, cut the time way down, and gives him a much better result than any other method he could have had.

Q. While you performed this operation upon Mr. Macartney, was he unconscious during the time? I mean he was under the influence of anesthetic, naturally? [93]

A. He had a spinal anesthetic, and he would not necessarily be unconscious at the time.

Q. Well, from the nature of that anesthetic could he feel any sensation while the operation was being performed?

A. He could not feel any sensation in his legs. It is a regional spinal anesthetic, which would make him numb from his hips on down.

Q. Then did you also give him something for

(Testimony of Howard L. Cherry.)

pain, you say, before that? A. Yes.

Q. What would be the effect of the medication you gave him for pain before this operation took place?

A. Well, the effect would be to relieve his pain, and it also makes him a little dozey and oblivious to a degree to what is going on around him.

Q. In other words, he would not know very much about what was going on around him, would he? A. I doubt that he would.

Q. Were each of these leg-bones broken in more than one place?

A. The right tibia was broken between the middle and lower third and then severely in the upper third, and the fibula was broken at one level. On the left tibia the major break is at the level of some small fragments at that level in the tibia, and the fibula is broken in several fragments. [94]

Q. How long was Mr. Macartney confined to the hospital while you were attending him?

A. He was in the hospital on the first admission for 34 days. I might mention that that is an extremely short time for such severe fractures as this, which is attributable to this new method of treating the fractures.

Q. All right, then, Doctor, just to save time, just go ahead and explain the sequence of events after his first operation, what you had to do, and how long he was in the hospital, and so forth.

A. He was treated in the hospital first with compression dressing, that is, a very thick cotton com-

(Testimony of Howard L. Cherry.)

pressive reinforced with plaster splints and then the plaster cast to well above his knees. Then walkers were placed on these casts. Then we had bilateral long-leg braces made, and we succeeded not in getting him into both long-leg braces at once but having one cast in a brace, then going and putting the other one in the cast and the other one in a brace. The trick here, of course, is, having two broken legs, we have two broken legs and two crutches, to try to get them going as soon as we can, and we went from one to the other in casts with braces in order that he could be out of the hospital and walking around enough to take care of his personal needs, and these were carried on for several months until he was able to walk with just the braces, and eventually he could walk with just braces [95] and no crutches.

We hospitalized him the other time on October 30, 1954. He was in the hospital for 15 days. This was in a period that he was unable to maintain himself with the walking casts outside, and we had to bring him in again because he couldn't take care of his needs in that manner. Then he was followed in the office essentially ever since this time.

Q. When did you last check him, Doctor, at your office?

A. I last saw him on November 16th. Wait a minute—yes, that's right, November 16, 1956.

Q. While he was in the hospital the first time, Doctor, did he suffer pain?

(Testimony of Howard L. Cherry.)

A. Surely, there is some pain, as you say, with fractures.

Q. Did he have to have medication for pain?

A. Yes.

Q. About how often would you see him while he was your patient there at the hospital?

A. I would see him every day.

Q. Then when he came back, you say, the second time, what happened?

A. He was brought in because he couldn't get around with his casts, and he was—the casts were changed, and he was kept down in a wheel chair in the hospital until such time as he could get up and take care of himself again.

Q. Do injuries of this nature that you have described that [96] Mr. Macartney sustained result in any limitation of motion or use of these injured legs of Mr. Macartney for the rest of his lifetime?

A. Yes.

Q. While he was a patient of yours in this hospital, did he complain to you of pain in both of his legs?

A. I presume.

Q. That would be the usual result of this situation, wouldn't it, Doctor?

A. Yes.

Q. What type of a pain is that, Doctor, that kind of pain? I mean does it last very long at a time, or does it come and go or what?

A. Well, it's a little hard for me to answer that. They do have pain, and it is intermittent, usually, and it is usually of gradually less severity following

(Testimony of Howard L. Cherry.)

the time of their injury. I presume you mean now the pain early in his hospitalization?

Q. That is right, Doctor. A. Yes.

Q. And then while he was there while you attended him, did you observe any objective symptoms that would indicate the existence of pain?

A. I don't think I can answer that. The usual thing is that if they complain of pain and we think that they have had [97] sufficient injury to account for pain, we give them something for pain. Pain, after all, is a subjective finding; not an objective one.

Q. In your opinion, Doctor, with reasonable certainty, are these injuries you have described the producing cause of the pain which Mr. Macartney suffered, suffered while he was your patient in St. Vincent's Hospital? A. Yes.

Q. And has Mr. Macartney permanent injury to each of his legs as a result of these injuries that you have described? A. Yes.

Q. What is the nature of these permanent injuries?

A. He has some restriction of his ankles which I have judged at 70 per cent of normal. He has some weakness in his legs, meaning mostly that they could not be expected to stand up to prolonged usage, prolonged hard usage, and there is a factor of pain that is the residual of a major bone injury which is intermittent and often is present the rest of the patient's life, and it is often affected by weather, and he can expect to have some pain of

(Testimony of Howard L. Cherry.)

that nature as a permanent residual of these fractures.

Q. That pain would be around his knee?

A. It could be around his knee, his ankles, or in the shaft of the bone.

Q. You mean all the way from the knee [98] down?

A. It could, yes.

Q. In either leg?

A. Yes.

Q. What can he do to relieve that pain when it occurs at this time? Supposing he would have it, we will say, yesterday while he was cutting the grass, then what would he have to do about it?

A. The greater part of his pain usually would be due to effort, or a good portion of it, and by cutting down the amount of effort and amount of work that he does he would cut down the amount of pain. Also, if he had pain of sufficient magnitude, some analgesics, empirin, aspirin, codeine, something of that nature would relieve his pain.

Q. In other words, he would have to take medication or else he would have to also sit down and not walk around?

A. That's right, or——

Q. Is that what you mean?

A. There is the third alternative, to endure the pain.

Q. I didn't hear.

A. I say the third alternative is to endure the pain.

Q. What effect will these injuries to each of Mr. Macartney's legs have upon his ability to do

(Testimony of Howard L. Cherry.)

regular general work as a longshoreman for the remainder of his lifetime?

A. I doubt that he could stand up to hard longshore work the remainder of his lifetime. [99]

Q. Doctor, based upon your entire knowledge and study of these injuries of Mr. Macartney and his present physical condition, I will ask you to what extent will these injuries and physical condition reduce his physical ability to perform manual labor such as general longshoring work?

A. That is a difficult question for me to answer. I would say that I do not believe that he will ever get back to the harder part of longshoring which requires getting in and out of holds and requires him to be quick on his feet and sustain heavy loads and lift and bend. He can do lesser functions that do not require these heavy functions at longshoring, but I do not believe he will ever get back to general longshoring.

Q. For example, will he be able to be in a position like loading wheat on a ship, for example, where he could sit down and just guide it through a spout? He could do that, couldn't he?

A. I am sure he could do that, yes.

Q. But he couldn't do the same kind of work he was doing when he got hurt, this pushing of crates of glass around, and so forth?

A. I am not fully aware of what pushing crates of glass around entails, but he would not be able to do heavy general longshoring work such as they are generally called upon to do.

(Testimony of Howard L. Cherry.)

Q. Involving the exercise of manual labor?

A. That is correct. [100]

Q. Do you think that will be his condition the rest of his life?

A. I feel that it will, yes.

Q. Assume, Doctor, that Mr. Macartney, who was 45 years of age on October 10, 1954, had prior to October 10, 1954, enjoyed reasonably good health and was physically strong, was working regularly as a longshoreman in the hold of a ship helping unload large crates of glass weighing about 1,200 pounds or more and that on the afternoon of October 10, 1954, while he was so working a large crate of plate glass, approximately 8 feet long, 10 inches thick, and 3 or 4 feet high, and weighing approximately 1,200 pounds or a little more, tipped off of a dolly from behind Mr. Macartney and fell down upon both of his legs from behind, throwing him down to the deck of this ship face down, and he had to be conveyed to St. Vincent's Hospital by ambulance where you did attend and examine him and operated upon Mr. Macartney as you have described and kept him under your care and observation as you have stated. Now, assuming these facts, Doctor, and from your own knowledge and experience as a physician and surgeon, can you state with reasonable certainty what, in your opinion, was the cause of Mr. Macartney's injuries and disability?

A. I feel that this accident as described is the cause of his accident and disability.

(Testimony of Howard L. Cherry.)

Q. How long will these steel rods have to remain in each of [101] his legs?

A. We do not remove them unless they cause some symptoms of some kind, and his appear to be intact and are not protruding through the bone, and I feel it will not be necessary to remove them.

Q. Now, there was some suggestion by somebody that Mr. Macartney used to play hockey before he got hurt. Could he play hockey today with these?

A. I don't believe so.

Q. Can he climb up and down a ladder or walk on the ship where he is required to do a lot of climbing in his work?

A. I think he could probably climb up and down a ladder once or twice, three times, but you don't do it continuously during his work.

Q. He cannot do heavy lifting work?

A. Not sustained heavy lifting. [102]

* * *

ANDREW J. WEBER

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. How long have you been working as longshoreman in Portland?

A. About ten and a half years.

(Testimony of Andrew J. Weber.)

Q. Have you worked in various phases of that occupation? A. Yes.

Q. Where were you working on October 10, 1954, on the day Mr. Macartney was injured?

A. I was at Terminal 1 on the ship Wyoming.

Q. What was your job at that time?

A. I was a hold man.

Q. Tell the jury and the Judge what you mean by that? [105]

A. That is a man that works in the hold discharging or loading cargo.

Q. What hatch or hold were you working in at that time?

A. We worked in two hatches that day; No. 5 and No. 4, I believe.

Q. What had you been taking out of No. 5?

A. We were discharging steel and wire, I believe.

Q. When did you get through doing that on that occasion, Mr. Weber?

A. Well, I believe we finished it at either noon or shortly after.

Q. Where did you move to?

A. We moved to No. 4 hatch.

Q. What was in No. 4?

A. Various sized cases of glass.

Q. How was it stowed on board ship?

A. I believe it was stowed fore and aft in the trunk of the ship, after end of the trunk.

Q. Where were you working with respect to Mr. Macartney that afternoon on the glass cargo?

(Testimony of Andrew J. Weber.)

A. I was working on the offshore side.

Q. On the offshore side?

A. Of the ship.

Q. Where was Macartney?

A. He was on the offshore side, also. [106]

Q. Then you had just recognized the gentleman who testified a little while ago, too, over there, didn't you?

A. Yes; he was Mr. Macartney's partner.

Q. Then what was the nature of your particular job?

A. It was to pick up the glass and, well, bring it out to the square so we could discharge it.

Q. In other words, you would help one of the boys put a crate of glass on one of these dollies we have been talking about and move it out to the square?

A. Yes.

Q. Would you show the gentleman the picture, Mr. Clerk?

(Exhibit 3-B presented to the witness.)

Does that look like the dolly that you were using that day, Mr. Weber?

A. Yes; it does.

Q. I don't mean exactly the same, but I mean the same type dolly?

A. It's the type we do use.

Q. Same type and size?

A. Yes.

Q. How many crates of glass had this gang on your side taken out that day before Mr. Macartney got hurt?

(Testimony of Andrew J. Weber.)

A. Well, it's pretty hard to remember. I would say about six or eight cases perhaps.

Q. Were they all the same size or different size cases? [107]

A. They were various sizes.

Q. Then they would weigh more or less according to the size of the case, wouldn't they?

A. Yes; they would.

Q. How was the ship moored to the dock at the time, Mr. Weber; do you remember?

A. Well, it was moored by its mooring lines.

Q. Do you know about how many?

A. How many lines; well, I wouldn't notice that.

Q. Well, was it the usual way they moored the ship? I mean, you can tell, can you?

A. Well, the average ship would use around six lines to moor it.

Q. As far as you know, that was the way that was?

A. As far as I know, yes.

Q. Then was the bow upstream or downstream with the dock?

A. The bow was upstream.

Q. Which deck of the ship was this glass cargo stowed on?

A. It was in the shelter deck. That is the deck below the main deck.

Q. About how large was the opening on the square of this hatch we have been talking about, just approximately how many feet across about, we will say?

A. Oh, about 20 feet across by—

Q. Could it be a little more or less? [108]

A. Yes; it would vary.

Q. You are just estimating?

A. Yes.

(Testimony of Andrew J. Weber.)

Q. Did you see yourself what Mr. Macartney was doing just before the accident occurred?

A. Just before the accident Mr. Macartney and his partner brought a case of glass down, and, well, they stopped it abreast a case that was already in the hatch or out in the square of the hatch to be discharged.

Q. How was the case out in the square of the hatch placed at the time you are talking about?

A. Well, it is placed on blocks so we could get a sling under it.

Q. What was the size block?

A. Oh, I imagine about 4 inches square.

Q. What was Mr. Macartney doing just before he got hurt?

A. He was hooking up this case of glass up in the square, and it's, well, what we call a bridle sling, and putting the sling around the end of the tape.

Q. Then his partner was working on the other end of it? A. Yes.

Q. How long had this case on the dolly behind him been standing there before it fell off the dolly, the case?

A. Oh, it was there for several minutes.

Q. Was there anybody standing nearby that particular dolly [109] or case of glass on the dolly before it fell on Mr. Macartney? I mean except Mr. Macartney.

A. No; Mr. Macartney and his partner were the only ones that was near it.

(Testimony of Andrew J. Weber.)

Q. Was there any line or cable attached to it in any way before it fell?

A. No; there was nothing attached to it. It was resting on this dolly.

Q. All right; it was just resting there on the dolly; is that right? A. Yes.

Q. Which way was the dolly and the case of glass facing at that time before it fell?

A. Well, it was facing inshore.

Q. That would be towards the dock?

A. Yes.

Q. Parallel with the dock?

A. It was parallel with the dock.

Q. About what size would that particular case of glass be on that particular dolly which fell on Mr. Macartney?

A. It was about 4 feet high, oh, approximately 6 feet long and about 10 inches thick.

Q. Did the ends of the crate of glass stick out across each end of the dolly?

A. I believe they did, yes. [110]

Q. What particular stevedoring company furnished this dolly?

A. Well, I believe all the stevedoring companies have dollies of this type.

Q. Well, you were working at the time for which one?

A. Working for Oregon Stevedoring Company.

Q. Did they furnish this dolly that day?

A. Yes.

Q. I will ask you whether or not a short time be-

(Testimony of Andrew J. Weber.)

fore this crate of glass fell on Mr. Macartney did you happen to look out the hatch of the ship at the dock? A. Yes; I did.

Q. What did you see at that particular time when you looked out of the hatch of the ship at the dock?

A. Well, my partner and I were talking about the roll of the dock. It seemed like it was bobbing up and down. It was more or less of an optical illusion. When you are on a ship like that if the ship is moving it will seem as if the dock itself is moving.

Q. Is that the condition that you noticed before this crash occurred?

A. Yes; we noticed it as well in the other hatch, also.

Q. You were working down there in the same deck near Mr. Macartney at that time; is that right? A. Yes, sir; that is right. [111]

Q. How much approximately of an up-and-down movement did you notice on that occasion just before this happened when you looked out at the dock?

A. Well, I would say about, oh, at least a foot, perhaps two.

Q. Did you look out at the dock more than once and notice this condition before that accident occurred that day?

A. Well, yes; we commented on it several times.

Q. You mean you looked at it several times?

A. Yes.

(Testimony of Andrew J. Weber.)

Q. And it existed several times before this happened? A. Oh, yes.

Q. Mr. Weber, do you know whether or not the portion of the hatch or hold below where you were working that day was loaded or was it empty at the time this accident occurred?

A. Well, it's kind of common practice to look in the lower hold to see if there is any cargo for discharging down there, and we lifted up the hatch cover. I noticed that the hatch was empty.

Q. That was before this glass fell on Mr. Macartney that day? A. Yes.

Q. When you noticed a condition of that kind, and keeping in mind also that No. 5 hatch or hold was empty, you say, after you got the steel cargo and wire, whatever it was, out of it, [112] what effect did that have upon the ship?

A. Well, it would be more or less in a, oh, top-heavy position.

Q. What does it make the ship do?

A. Well, it would, it would have a tendency to roll alongside the dock even.

Q. Which way does it roll?

A. Well, it would roll sideways.

Q. What? A. It would roll sideways.

Q. You mean towards the dock?

A. From port to starboard.

Q. From port to starboard. Mr. Weber, did you notice whether or not the deck where you were working at the level you were working that day was sloping or not before this occurred?

(Testimony of Andrew J. Weber.)

A. Well, the ship did have a list because we were working on the offshore side, and when we rolled the dolly down, well, we had to more or less hold it back a bit to—in other words, it would more or less roll on its own, where on the other side they had to push it up to get it to the square of the hatch.

Q. Now, this list that you mentioned existing, was that before this accident happened?

A. Yes.

Q. How long had it existed before this happened?

A. Oh, I would say perhaps an hour before the accident happened. [113]

Q. What I am getting at is, was it there when you came down to start working the glass cargo?

A. Yes; the ship had a list all day, if I remember right.

Q. Oh, all day; you mean while you were working the steel cargo, too?

A. Yes.

Q. Which direction did you say this list would be?

A. Well, it was listing to port.

Q. Towards the dock?

A. Yes, towards the dock.

Q. Towards the dock; all right.

Can you tell me approximately, Mr. Weber, in the distance in making up the river side of the hatch to the square of the hatch—that would be the port side of the ship, we will say, just as a matter of roughly——

A. Oh, just the hatch?

Q. From the side of the ship on the river side

(Testimony of Andrew J. Weber.)

to the square of the hatch, how much of a list would there be?

A. Oh, that would be pretty hard to tell, maybe four or five degrees. [114]

* * *

Q. Was Mr. Macartney working on this particular operation taking the crates of glass out the same as he had done the day before on these other crates of glass; that is, take them out of the square of the hatch, he and his partner, and put one out in the square and leave another one sitting behind [116] him on the dolly?

A. Well, yes; it is common practice if you are waiting to take one load out, well, to just get another load and just stand by.

Q. Then you would go out in the front of it and hook up the gear on the one that is out there; is that right? A. Yes; that is right.

Q. Is that the usual, customary and usual practice? A. Yes; it is.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Mr. Weber, didn't you see 594 tons of cargo in the lower hold of No. 4 hatch that day before the accident, for Vancouver, B. C.?

A. Well, I don't remember of any cargo being for Vancouver. I mean, it would be—well, it would be marked Vancouver no doubt if one would look

(Testimony of Andrew J. Weber.)

at it close, and I didn't notice any Vancouver cargo.

Q. Did you take the hatchboards off of the shelter deck and look down into the lower hold?

A. It's the general practice, you know, to just lift up the hatch cover and look down to see if there was any cargo.

Q. Did you do that on this day; do you remember? [117]

A. Yes.

Q. You say there was nothing down there?

A. No. 4 hold I didn't see anything.

Q. Were there lights down there that you could see?

A. No; there was no lights.

Mr. Tatum: That is all. [118]

* * *

Mr. Conway: For St. Vincent's Hospital, Portland, Oregon, for hospitalization, \$1,131.70; Dr. Howard Cherry for services, \$621.00; \$13.00 for Buck Ambulance Service; \$174.50 for postorthopedic services; \$5.70 for Shaw Surgical Supply Company; \$43.50 for medicines and medication, making a total of \$1,989.40.

I will call Mr. Roberson. [124]

GUY I. ROBERSON

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. How long have you been longshoring here in the Portland area?

A. Oh, somewhere in the neighborhood of 18 years.

* * *

Q. Where were you working on October 10, 1954, on the day Mr. Macartney was injured?

A. I was working as a member of the deck gang, the gang that he was working in the hold.

Q. On what ship? [125]

A. In other words, I was driving winch.

Q. You were on the Wyoming? A. Yes.

Q. You were operating one of the winches on the ship that day? A. Yes.

Q. Do you recall, Mr. Roberson, the way the ship was moored to the dock on that occasion?

A. I am afraid I don't.

Q. Well, I mean what lines did she have?

A. I couldn't tell you because I don't remember.

Q. All right.

A. I didn't pay too much attention anyway.

Q. How long have you known Mr. Macartney?

A. That would be hard to say.

Q. Well, I mean approximately?

(Testimony of Guy I. Roberson.)

A. Oh, I would say maybe six or seven years.

Q. Did you have occasion to work with him from time to time before he was injured along the waterfront?

A. Yes.

Q. Can you state whether or not he was able to do a reasonably good job as longshoreman before this accident happened?

A. Yes.

Q. At different kinds of work on the waterfront?

A. Yes. [126]

Q. Down in the hold of a ship, for example, was he able to do that?

A. Well, we packed 140-pound sacks of flour together, wheat.

Q. Did he have any trouble doing that kind of work?

A. No, sir.

Q. Then what difference have you noticed in him since he got hurt on October 10, 1954, in connection with his ability to work?

A. Well, it is very obvious he walks as if he were walking on eggs. In other words, it is pretty obvious that his legs are tender because he steps very carefully, and as far as what kind of work he has been doing, I don't know. I have not seen him do any lifting of any kind since he was hurt. [127]

* * *

Q. Then did you finish unloading the glass cargo that same afternoon?

A. That I can't remember.

Q. What does it mean, Mr. Roberson, when you say that a ship is tender? What does that mean?

(Testimony of Guy I. Roberson.)

A. It means that it rocks easily.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Mr. Roberson, at the time Mr. Macartney was hurt and this lot of glass fell on him, it is a fact, isn't it, that you had no cargo on your gear at that time?

A. I believe that is correct. I believe we had—were just bringing the slings in to get another case of glass.

Q. So that the operation of your gear to that moment of his injury could not have caused any movement of the ship?

A. Not our particular gear, no.

Mr. Tatum: Thank you. That is all.

Redirect Examination

By Mr. Conway:

Q. There was another hatch or two being worked at the same time, though, weren't there? [133]

Mr. Tatum: I object to that as leading.

Q. (By Mr. Conway): State whether or not there was another hatch being worked at the same time?

A. As nearly as I can remember, there were at least one other hatch and possibly more—now, just how many gangs were on the ship I have [134] forgotten.

VIOLET MACARTNEY

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. Before Mr. Macartney was injured, from your own observation, was he able to get around pretty well on his legs and use them in the usual way?

A. Yes; I would say that while he gets along very well now [135] with his handicap, it is trifling compared to what he used to get around.

Q. That is what I mean. Before did he have any difficulty with either leg? A. No.

Q. Did he play hockey for awhile a few years back? A. Yes; for a number of years.

Q. For whom did he play?

A. Oh, he played for Portland, Seattle, Vancouver, Calgary, and the Montreal Canadiens. [136]

* * *

Q. Does he make any complaints since he got injured about any aches and pains in his legs?

A. Yes; I hear them every day. He is very nervous. He doesn't sleep well, up and down all night. After he works during the day, he usually comes home with his legs and ankles swollen.

Q. Did he have any trouble like that before he got his legs hurt? A. No. [137]

* * *

WALTER H. MACARTNEY

plaintiff herein, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. What education do you have?

A. Well, just a grade school is all.

Q. Did you finish grade school? A. Yes.

Q. How old are you? A. 47.

Q. How long have you been following the occupation of [138] longshoreman here in the Portland, Oregon, area? A. I think since 1942.

Q. Are you trained or qualified to do any other kind of work besides longshoring?

A. No; I am not.

Q. When and where did you first commence to do longshoring work? A. Portland, here.

Q. What was the amount of your earnings per day as a longshoreman during the year 1954 up to and at the time you were injured on October 10, 1954?

A. For a nine-hour day it was \$22 and something. [139]

* * *

Q. (By Mr. Conway): In 1955, Mr. Macartney, after you were injured and you went back along in the summertime, whenever it was in 1955, I will ask you whether or not your earnings for that year

(Testimony of Walter H. Macartney.)

amounted to \$2,204.63 according to your income tax return for 1955? A. Yes. [140]

* * *

Q. (By Mr. Conway): Mr. Macartney, have the wages of longshoremen been raised since October, 1954, in Portland, including your own?

A. Yes; quite a bit.

Q. How much?

A. Well, on a nine-hour day it is about \$26.75. That is on straight cargo, and if you work wheat it is 20 to 30 cents an hour more.

Q. Roughly, what would that be in percentage figures? A. For like unloading wheat?

Q. Yes. A. It would run around \$29.00.

* * *

Q. At the time you were working as hold man for these several [141] years prior to October 10, 1954, as longshoreman, did you have any difficulty or discomfort with either your right or left leg in doing all kinds of your work?

A. No; I didn't.

Q. Did you have any pain or disability during these years before October 10, 1954, in either your right or left leg? A. No.

Q. Approximately what time was it on October 10, 1954, that you went to work as hold man assisting in unloading these crates of glass in the No. 4 hold on the Wyoming?

A. Well, we unloaded steel in No. 4 in the morn-

(Testimony of Walter H. Macartney.)

ing. I think it was kegs of nails and a little other general cargo.

Q. That was a different hatch, wasn't it?

A. Yes; that was No. 5.

Q. No. 5. All right, then. When did you start working on the glass?

A. We went into No. 4 right after dinner.

Q. When you say dinner, you mean noontime?

A. Yes.

Q. By whom were you employed on that occasion? A. The Oregon Stevedoring.

Q. From what part of the hold did you and your partner move these crates of glass on this dolly we were talking about yesterday?

A. From the offshore side. [142]

Q. You were working on the offshore side of the ship? A. Yes.

Q. How many of these crates of glass did you move that day before the accident took place?

A. Oh, I would say 10 or 15.

Q. How many? A. 10 or 15.

Q. Did you move all those particular crates of glass that day before this happened and use the same method of operation that you were using on the particular crate that was involved in the accident? A. Yes; we did.

Q. Tell the jury and the Court how you moved the crates of glass and what you did with them?

A. Well, we ran the dolly in in the wing, or in the aft end, and ran this dolly underneath the crate,

(Testimony of Walter H. Macartney.)

and then the gang would pull the crate back on the dolly, and then we would push it out to the hatch.

Q. How would you get the crate of glass on the dolly?

A. Well, we just—there is two little clips on the dolly, and we just ran the clips underneath and then pulled the crate of glass back on the dolly.

Q. Then the glass, the case of glass would rest on the dolly by itself? A. Yes. [143]

Q. Without being fastened?

A. That is right.

Q. Then you and your partner would do what?

A. Well, we would push it out to the hatch.

Q. Then did you put it out in the square of the hatch so that the gear could come down and pick it up? A. Yes.

* * *

Q. Mr. Macartney, what did you do when you got to the square of the hatch with the dolly and crate of glass?

A. We left it sitting there and hooked up the other load.

Q. How far behind the case in the square of the hatch did you leave the dolly sit with the case of glass on while you were waiting for the slings to come down?

A. Oh, I would say three or four feet.

Q. What did you do in connection with fastening the sling on when it came down?

A. Just hooked the sling around the two ends, and they would hoist it up. [144]

(Testimony of Walter H. Macartney.)

Q. Which way would you be facing?

A. I would be facing inshore.

Q. What would be behind you?

A. Well, it was the dolly with the glass on it.

Q. Which way would it be facing?

A. It would be facing inshore.

Q. Would it be parallel to the shore?

A. I would say so.

Q. Is that the same method of operation that you did with all these other cases you moved out before the accident happened? A. Yes.

Q. Is that the usual and customary manner of doing that operation?

A. Well, that is—I have not worked glass very much. I guess that's about the first time or so that I worked it, might have worked it once before, but, so far as I know, that is the only way they ever worked it.

Q. Would you please show him the picture of a dolly?

(Photograph presented to the witness.)

The picture you have there, Mr. Macartney, do you recognize that? A. Yes.

Q. Is that the same type of dolly which you were using that day? [145]

A. Yes, I think it is the same.

Q. Who furnished the dolly that you were moving these crates of glass out with; do you remember?

A. I imagine the Oregon Stevedoring Company.

(Testimony of Walter H. Macartney.)

Q. Who was your working partner?

A. John Raanes.

Q. When you left the dolly behind you with this crate of glass on it standing up by itself, how long was it standing there after you left it before the accident happened?

A. It was a few minutes. I couldn't say.

Q. Was there any other fellow working in the immediate vicinity of that case of glass or dolly at the time besides you and your partner?

A. Raanes was on the other end, and I was on the other end.

Q. Just you two gentlemen?

A. Well, as far as I know now.

Q. You didn't see anybody else there?

A. No.

Q. After you left this dolly and you and your partner brought it over there to the square of the hatch like you mentioned, what did you then do?

A. Well, we were waiting on the gear to come in, and when it came in we started to put the slings around the load of glass, and when we were doing that the other crate of glass come off the dolly and pinned me underneath the crate of glass. [146]

Q. Did you have any warning or hear any sound of this crate and dolly tipping over on you?

A. No; I didn't.

Q. About how far were you standing in front of it at the time it fell? A. Of the dolly?

Q. Yes, of the dolly.

A. Oh, I would say three or four feet.

(Testimony of Walter H. Macartney.)

Q. Did you have your back to it?

A. Yes.

Q. You were facing which way?

A. Inshore.

Q. Do you know whether or not you had your hand on the case of glass that was standing in the square of the hatch?

A. Well, I just started to hook it up, I think, putting the slings around it.

Q. Then do you recall what size of crate of glass this was that fell on you?

A. Oh, I would say 7 or 8 feet long, 8 or 10 inches thick and, oh, 4 or 5½ feet high.

Q. Approximately how much would it weigh?

A. I would say 1,500 pounds.

Q. When you were moving this particular crate over to the square of the hatch, did you notice anything different about moving it over there than any of the other cases you moved [147] that day before the accident happened?

A. No; I didn't.

Q. Was it well placed on the dolly or not; do you know?

A. Well, yes; the same as the others.

Q. The same as the others?

A. Yes.

Q. About how far was it, Mr. Macartney, that you moved this dolly with this crate of glass on it that fell on you from where it had been stowed?

A. Oh, I would say approximately 20 feet, 25.

Q. Was the ship headed upstream or downstream with the dock?

A. The ship?

Q. Yes.

A. Upstream.

(Testimony of Walter H. Macartney.)

Q. What did you do after this crate of glass fell upon you?

A. Well, it kind of knocked me out a little, and I don't remember very much.

Q. Do you remember about how long you lay there?

A. Well, it wasn't very long.

Q. Did you feel any pain?

A. I beg your pardon?

Q. Did you feel any pain?

A. Yes; I had a lot of pain.

Q. Where?

A. All over me, I guess. [148]

Q. How did you get out of the ship after you were injured?

A. Well, they put a board down there, and they hoisted me out on the board.

Q. Did any of the fellows go out with you?

A. I think there was one and one fellow off the ambulance, I think, if I remember now. I wouldn't say.

Q. What did you do after you got out on the dock?

A. Well, they put me in the ambulance and rushed me to the hospital.

Q. To which hospital did you go?

A. St. Vincent's.

Q. Is there anything that you could have done yourself when you had your back to this crate of glass to avoid having it hit you?

A. Well, no; I don't think so.

Q. You say you didn't hear any sound when it fell?

A. No sound at all.

(Testimony of Walter H. Macartney.)

Q. Nobody said anything to you about it falling?

A. No.

Q. Didn't say Yes or No? A. No.

Q. What part of the crate of glass hit the back of your legs?

A. Well, it hit them right across here (indicating).

Q. When you say "here," you are talking about half way to the [149] knees from the ankles?

A. Well, it's about four inches from the ankle on both feet.

Q. What part of the crate hit you there?

A. Well, around mostly the top, I think.

Q. What was the crate of glass made of, the outside crate? A. Wood.

Q. How did they get the crate off you?

A. Well, as far as I remember, they all ran over and lifted it off.

Q. Do you know about how many men it took to lift the crate off? A. No, no; I wouldn't.

Q. Was this in the 'tween decks level where you were working at the time? A. Yes.

Q. What difference have you noticed in your legs yourself since you had this accident than your legs and the way you were before you were injured; do you remember?

A. Well, I see a big difference. I have not got any power in them, and they ache all the time, and I don't get any sleep at night. I am up four or five times a night. I have these Charlie horses in the back a lot of times.

(Testimony of Walter H. Macartney.)

Q. Speak a little louder.

A. I have these Charlie horses in the back a lot.

Q. Back of what? [150]

A. Back of my legs. I never had those before. I am up four or five times a night. I don't get any sleep.

Q. Did you have any trouble like you are talking about before this accident happened?

A. No.

Q. Did you ever have any trouble with your legs? A. No.

Q. Before this accident happened?

A. No.

Q. Were you more or less active in years gone by in playing hockey?

A. Well, I played professional hockey for fifteen years.

Q. Did you ever have any trouble with your legs while you were playing professional hockey?

A. No.

Q. Do you have any sensation in your legs when you are mowing the lawn, for example, at home?

A. Well, I mow a little, and I have to rest.

Q. What do you feel when you try to do that?

A. Well, I have not got any power in them. They swell up if I am on them a lot.

Q. What do you notice about your legs if you do a lot of working?

A. Well, my ankles swell up a lot.

Q. Do you have any pain in them? [151]

(Testimony of Walter H. Macartney.)

A. And I can only walk so far. Yes, I have pain in them a lot.

Q. State whether or not you have any ache in them and how often?

A. Well, they ache mostly at night and when I have been on them a little, and during the day they are fair; not good.

Q. Do you still have a steel rod in each one?

A. Yes.

Q. Can you feel those rods when you walk?

A. Well, just—no, I can't feel them, but I can't jump down at all on account of the rods, I guess, being in my instep, and I can't get on my knees. I don't know why that would be, but I have a sharp pain in there if I get on my knees.

Q. In connection, Mr. Macartney, with the kind of work, manual labor, that you were doing as a longshoreman at the time you were injured and before you were hurt, have you been able to do any similar type of work as that since you were hurt?

A. No; I can't.

Q. Why not?

A. Well, I have got no power in my legs.

Q. What type of longshore work are you able to do since you got hurt?

A. Well, I am what they call, I am on what they call the "old man's board." [152]

Q. What does that mean?

A. What we have usually is barges that come up from the Snake River and Umatilla and The Dalles with wheat and have a suction out at Terminal 4

(Testimony of Walter H. Macartney.)

where it is run by an electrical appliance, and it has got six rubber hoses and what we call shoes, and it comes down into the hold of the barge, and it sucks this wheat up. All we have to do is just move it when the wheat is—move it maybe a foot or so at a time until that sucks out, and in that way I am sitting down 90 per cent of the time, I would say.

Q. You have to sit down most of the time at that particular job, do you?

A. And I work for, I would say, 75 per cent of the time.

Q. In that connection, though, the loading of wheat like you mentioned, can you make as much doing that, or is the work as frequent as it is on the other type of longshore work you used to do?

A. Well, you never know. Now there has not been any in for a week. They have had these what you call dead ships, loaded 50 of those and sent them down to Astoria and bringing those back to unload the dead ships, and in that way there has not been a barge this week for six days.

Q. You have no way of knowing, then, when they are going to load wheat?

A. We have no idea at all. [153]

Q. Is it more or less seasonal?

A. Yes; it is. You may have one every day for a month, and you may not have one for a week or ten days.

Q. Are you able to do now the kind of work as a

(Testimony of Walter H. Macartney.)

hold man climbing up and down a ladder, and so forth, that you did before you were hurt?

A. Well, I have never been in the hold of a ship since I got hurt.

Q. Can you climb up and down ladders like you used to? A. No; I can't.

Q. Approximately how much have your earnings as a longshoreman been reduced as a result of these injuries?

A. Oh, I would say \$2,500, \$3,000, between that.

Q. You mean per year? A. Per year.

Q. What was the amount of your loss of earnings as a longshoreman from the time you were injured on October 10, 1954, up to the time of this trial today?

A. Oh, I would say eight or nine thousand.

Q. Eight or nine thousand dollars?

A. Yes. [154]

* * *

Q. (By Mr. Conway): Did anybody in the employ of this ship or anybody else tell you anything about the ship listing while you were working?

A. That I can't remember now.

Q. Did anybody in the employ of the ship say anything to you at all about the manner of working this particular cargo, the unloading operation or method to use for such cargo unloading?

A. No; they did not.

Q. How many times had you worked on ships unloading glass in crates before the day you were injured?

(Testimony of Walter H. Macartney.)

A. Well, I might have worked in them once before, but I am not sure on that.

Q. During the time you were working down in this No. 4 hold, [155] Mr. Macartney, unloading these crates of glass, did you see any ship's officers in the hold? A. No; I did not.

Q. Did you see any ship's officers looking over or down into the hatch to see what you were doing while you were unloading this glass?

A. No; I did not.

Q. After you were hurt did you have any occasion to look at the dolly that the crate of glass fell off? A. No; I didn't look.

Q. What kind of a floor did this deck have that you were working on?

A. It had a steel floor.

Q. Was it rough or smooth?

A. I would say it was fairly smooth.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Isn't it a fact, Mr. Macartney, that on the day you were working down in the Wyoming that you didn't know whether the ship had a list or not?

A. Well, yes; that is right.

Mr. Tatum: That is all. [156]

(Testimony of Walter H. Macartney.)

Redirect Examination

By Mr. Conway:

Q. When you were working down in the hold that way, the way you were working, could there be a list on the ship and you not know it?

A. Oh, yes; you can't tell if there is—well, you could tell if there was a very large list, but a few degrees you can't tell down below. [157]

* * *

CHARLES W. FOSTER

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tatum:

Q. Will you state your name, please?

A. Charles Foster.

Q. Where do you live, Mr. Foster?

A. Portland.

Q. What is your occupation?

A. I am a supercargo.

Q. What in general is a supercargo?

A. A supercargo is a sort of business agent for the steamship. Years ago it was the traveling representative of the shipowner that picked cargo and handled the loading and unloading of it, but now mostly you do the cargo work and paper work and

(Testimony of Charles W. Foster.)

such work connected with the shipping business. You represent the steamship agency on the job of ship loading or unloading.

Q. You are a shore-side employee?

A. That is right.

Q. You work on different ships from time to time?

A. I do.

Q. Do you work for different companies from time to time?

A. I do. [159]

Q. Are you generally in charge of keeping the records of the loading and unloading of ships when they come into Portland or Oregon harbors?

A. That is the main part of our work, yes.

Q. Keeping records for loading and unloading?

A. That is right.

Q. In doing that, are you down on the ship during your entire shift?

A. That is right, all the time.

Q. Are you sort of an intermediary between the ship's officers and the longshormen?

A. I am sort of intermediary between the steamship uptown office, the stevedore, and the ship's officers.

Q. Were you acting as supercargo on the M. S. Wyoming when she was in Portland on October 10, 1954?

A. I was.

Q. I hand you herewith a lot of documents stapled together as Exhibit 25 for Identification. On the top there, Mr. Foster, are those the written reports made by the supercargo for the Wyoming when it was in Portland on that particular trip?

(Testimony of Charles W. Foster.)

A. Yes, they are.

Q. Do you have someone else who takes the night shift on these ships?

A. Yes, if the ship works night and day we have a night man and a day man. We change at 7:00 o'clock in the evening. [160]

Q. Were you the day man on that shift?

A. I was.

Q. Do your records which you now have before you show that you were working on October 10, 1954, as supercargo on that ship?

A. That is right.

Q. Do you have one sheet which shows the unloading from the vessel? A. Yes.

Q. Do you have another sheet which shows the loading on that particular day? A. Yes.

Q. From examining the sheet which shows the loading on October 10th, could you tell me—I mean the unloading—could you tell me what was unloaded that day?

A. Yes, we unloaded 25 ton of steel from No. 3, 50 ton of glass from No. 4, and 119 ton of steel from No. 6.

Q. Does that record also show the time that these particular shipments were being unloaded?

A. Yes, it does. We had two gangs working. One gang worked No. 3 hatch from 8:00 o'clock until 10:00 o'clock discharging steel, and then they started to loading, and the other gang started in No. 6 and worked from 8:00 o'clock until 1:45 discharg-

(Testimony of Charles W. Foster.)

ing steel. Then they shipped it to No. 4 hatch and discharged glass from 1:45 until 6:00 o'clock [161] p.m.

Q. Then at 2:00 o'clock or 2:10 p.m. on October 10th, what hatches were working unloading cargo?

A. Just one, the No. 4 hatch.

Q. Was that the hatch where the glass was?

A. That is correct.

Q. Was there any loading going on at that particular time?

A. Yes, we were loading—at 2:00 o'clock?

Q. At 2:00 o'clock in the afternoon.

A. Yes, we were loading frozen fish in No. 3 'tween deck.

Q. So at 2:00 o'clock in the afternoon on October 10th we have one gang working glass at No. 4 unloading and one gang at No. 3 loading frozen fish; is that correct? A. That is correct.

Q. Were there any other gangs of longshoremen working on that ship at that time?

A. Nowhere.

Q. Now, in loading frozen fish how heavy is the cargo?

A. Frozen fish packed for the French trade is quite light. It is put up in boxes about, oh, 2 feet deep, about 2½ feet wide, about 4 feet long, and the individual box probably weighs around 200 pounds. They usually put about five or six boxes on a board. They are quite bulky, and you do not get too much on a board. I suppose you could get up to ten on a board at the most.

(Testimony of Charles W. Foster.)

Q. Do your records show how much total frozen fish was loaded [162] on that day?

A. Yes, we didn't have very much; 24 long ton.

Q. How long did it take them to load 24 tons?

A. Well, it took them from 10:00 o'clock in the morning until 3:30 in the afternoon. That is four and a half hours and no one lost time, so it took them four and a half hours to load 24 ton, six ton and—six ton an hour about.

Mr. Tatum: I offer in evidence, that exhibit, your Honor.

The Court: Is there any objection?

Mr. Conway: No objection.

The Court: It is admitted.

(Document previously marked as Defendant's Exhibit 25 for Identification was thereupon received in evidence.)

Mr. Tatum: I ask the Bailiff to hand Mr. Foster Exhibit 23.

Q. Would you tell us what Exhibit 23 is?

A. Yes, it is a cargo plan of the motorship Wyoming as it was loaded in France for discharge on this coast.

Q. Does it show the locations of the cargo for the Pacific Coast ports on that voyage?

A. It does.

Q. Does it show Los Angeles, San Francisco, Seattle, Vancouver and Portland? [163]

A. Correct.

Q. Do you know from your records and knowl-

(Testimony of Charles W. Foster.)

edge how much of this cargo—whether the ship was destined to go to any other ports for unloading after Portland?

A. Yes; it was to go to Vancouver and Seattle.

Q. How much cargo was in the ship destined for Vancouver? A. 1,145 ton.

Q. How much was destined for Seattle?

A. 100 ton.

Q. How much was taken off here in Portland?

A. 559 ton.

Q. By examining that document, are you able to tell whether or not there was any cargo for Vancouver stowed in No. 4 hatch on this particular day?

A. Oh, yes; plenty.

Q. How much? A. 594 ton.

Q. Stowed in No. 4?

A. In No. 4 lower hold; that is right.

Q. Is that the area which was directly underneath the place where the glass was stowed?

A. That is right.

Q. Do your records show what the draft of the ship was at various times during the operations in Portland?

A. Yes, mornings and evenings, and when I start in the [164] morning I take the draft. When I quit in the evening I take the draft, and the night man takes the draft in the evening, and he takes the draft again in the morning.

Q. What does that show, the draft?

A. It shows whether your ship is going up or down in the water. It shows the displacement immersion in the water.

(Testimony of Charles W. Foster.)

Q. Does it show how far down the ship is in the water? A. Yes; that is what it is.

Q. There are marks on the bow and stern, numbers? A. That is right.

Q. That is what you read. It shows how many feet it is down? A. That is right.

Q. Does that show how fully loaded it is weight-wise? A. Yes; it does.

Q. How fully loaded was this ship when she came in, roughly?

A. Well, I don't know exactly. The ship is about, I would say, an 11,000-ton ship, and with the beam length of her that she is she would probably have a total light summer draft of around 28,000, and the daily reports will show you what draft it was the day we were working, on the 10th. In taking the draft, you take the forward draft and the after draft and divide by 2 for your mean draft, and your mean draft is your guiding factor in the depth of a ship. At this time this ship with no cargo in her, only fuel oil and water, an empty ship [165] would probably draw maybe minus one foot forward, a rough estimate, I would say 10 feet aft to keep her wheel down for propulsion, so only with fuel oil and water, empty, you would probably have a mean draft of around, oh, 7 feet, something like that. The day that this occurred, on October 10th, you had a mean draft of 18 feet and 7 inches, so the ship is a little less than half loaded, I would say.

(Testimony of Charles W. Foster.)

Q. Was it that way all the time it was in Portland?

A. Well, we didn't change it very much. We only discharged 559 ton and loaded 164 ton, so—and it takes about 60 ton—55 ton at this stage of loading to move that ship an inch.

Q. Do you know what the meaning of the word "tender ship" is? A. I certainly do.

Q. Have you been on many ships during your work as supercargo? A. Yes.

Q. Were you on the Wyoming all day the day of October 10, 1954?

A. I would not be on it every minute of the day, no, sir; on and off it. I was on the dock side or on the ship all day of the 10th.

Q. Was she a tender ship that day?

A. Negative.

Q. Why do you say that? [166]

A. Because she has no deck load at all, and she has about, I believe she must have around 5,000 tons of cargo while loading and discharging cargo, 4,000 anyway. I have no way of knowing from this, but from the draft she must have either oil, water—at least to put her down to a mean draft of 19 feet she must have around 4,000 tons of weight in her, and, that being in the bottom, your ship could not be tender. A ship like that if loaded with homogeneous cargo from the bottom upwards, your lower holds, and figuring stability in a ship, your lower holds, the double bottoms are the one page, then the strata for the 'tween deck, another strata for

(Testimony of Charles W. Foster.)

the shelter and another strata is the third. This ship had very little cargo in her upper strata. What she did have was mostly in her lower strata.

Q. Would you say the ship was very stable that day?

A. I would say she was a stable ship, yes.

Q. Working on her that day, did you observe the list of the ship?

A. No appreciable list. It would not exceed, well, I didn't observe any, but if it was over two degrees or two and a half degrees I certainly would observe it.

Q. Did you observe any unusual list that day?

A. No; I say if—a list of two degrees is not an unusual list, or a degree and a half is not an unusual list. If it is over that, it is my job to wonder why it is. [167]

Q. Did you observe any unusual working of the ship that day in the water?

A. No, sir; normal.

Q. Are you familiar with these dollies the long-shoremen use for unloading glass? A. I am.

Q. Would you show the witness the exhibit which is a photograph of the dolly.

(Exhibit presented to the witness.)

Is that the type of dolly which is used?

A. That is right.

Q. Have you seen this dolly used?

A. Many, many times.

Mr. Tatum: That is all.

(Testimony of Charles W. Foster.)

Cross-Examination

By Mr. Conway:

Q. Mr. Foster, by whom were you employed on October 10, 1954?

A. General Steamship Company.

Q. Are they the agents for the Compagnie Generale Transatlantique Corporation?

A. French Line; yes, sir.

Q. That is the proper name that I just mentioned?

A. The cargo plan is written in French, too, but I don't [168] speak it.

Q. I was not speaking French. I am asking if that was not the French Line, if that was not the proper name that I asked; is that right?

A. I worked the Wyoming, as far as I know, the name of the line is the French Line. It has always been called that by General Steamship Company. I suppose that is correct.

Q. How long have you been working in that capacity for them?

A. I worked for various employers, any steamship agent in Portland that wants to hire me if I am free, or any place else on the Pacific Coast I worked for them. I work for General Steamship mostly.

Q. What I mean is, how long before this happened had you been working for this particular agency, the General Steamship Corporation, representing this particular line?

(Testimony of Charles W. Foster.)

A. We work, in my profession we work from ship to ship, and I worked for General Steamship Company on this job from the day before the ship started. The day before the ship starts they call us to the office, and we pick up the papers and then represent them. The day after it finishes we turn in the papers, and we are ready for any other job with any other employer that may come along.

Q. In other words, General Steamship Corporation by whom you are employed represents several different steamship companies, don't they? [169]

A. Yes; they represent several steamship companies.

Q. As their agents here in Portland, Oregon?

A. That is right.

Q. This happens to be one of them?

A. That is right.

Q. How long were they representing this particular corporation before October 10, 1954?

A. I have no idea.

Q. How long have you been doing that particular work that you mentioned yourself?

A. Supercargo work?

Q. Yes.

A. Well, I studied foreign trade in college. I graduated in 1932. I have been longshoreman, checker, supercargo ever since.

Q. Since 1932? A. That is right.

Q. Do you know Pierre Canoen, who was Captain of the Wyoming on October 10, 1954?

A. I don't believe so. I probably met him. I

(Testimony of Charles W. Foster.)

have probably met the man, but I don't know him. I wouldn't know him.

Q. Did Mr. Tatum here tell you that we took his deposition on December 1st? A. No, sir.

Q. He did not? [170] A. No, sir.

Q. Do you think he would know more about what was on board the ship than maybe you did?

A. No, sir.

Q. You do not think he would?

A. No, sir. The Captain usually does not make it his work. That is the Chief Officer's work to know about where the cargo is.

Q. If he said that the ship had 1,800 ton of cargo when it came to Portland, would that be correct, according to your figures?

A. He would probably know that, yes, sir, because he reads the log.

Q. That is what I mean. So you could be mistaken about how much cargo was on it, couldn't you?

A. Yes; I could, but I would not be too far off because her drafts indicate that she is drawing 19 feet, and when the ship's maximum draft would be around 28 feet she goes down about 700 ton to the foot, so you have about 9 feet at 700 ton.

Q. Don't you have a copy of the log there with you?

A. No, sir; I never read the ship's log.

Q. Didn't Mr. Tatum give you a copy with these other documents? A. No, sir. [171]

(Testimony of Charles W. Foster.)

Q. According to your figures, how much cargo was discharged here in Portland?

A. 500 some odd tons, I think it was.

Q. How much? A. 549 ton.

Q. Then you say how much was put on?

A. 164.3.

Q. 164? A. That is right.

Q. But you do not have any figures as to how much cargo was on board the ship when she sailed?

A. No, sir.

Q. Do you know approximately the size of this particular dolly in this picture that you have seen?

A. Yes; I am quite familiar with that. I have seen them for a long time.

Q. Can you give the approximate dimensions of it?

A. I would say about 4, 4½ feet high by 6 feet long, a foot and a half to 2 feet deep.

Mr. Conway: I think that is all; thank you.

Mr. Tatum: That is all, your Honor.

(Witness excused.)

Mr. Tatum: I offer in evidence the exhibit with the chart on it. [172]

The Court: It may be admitted.

(Document, cargo plan of Motorship Wyoming, previously marked Defendant's Exhibit 23 for Identification, was received in evidence.)

Mr. Conway: May I ask him a question, your Honor?

(Testimony of Charles W. Foster.)

The Court: Yes.

(Witness Charles W. Foster was thereupon recalled for further cross-examination by Mr. Conway, as follows.)

Q. (By Mr. Conway): Mr. Foster, I forgot to ask you, and the Judge was kind enough to let me, what makes a ship list back and forth when it is in port?

A. What makes a ship list and what makes it list back and forth is two different things. What makes a ship list is inequality of the weight distributed sideways. What makes it list back and forth is normal action of a ship in water which has to move because the water is fluid and the ship is not, and if your ship is a stiff ship or heavily loaded in the lower strata you have very little movement, and if you do have it it is a quick and decisive movement because it is rocking with a lot of weight in the bottom; but if your ship is tender then when you are reaching your minimum of GM, which is geometric center of stability, your ship tends to become quite tender, and it does not take very much weight to make her go from one [173] side to the other.

Q. Well, then, this particular ship, Mr. Foster, on that occasion, that day, October 10, 1954, do you remember how she was moored at the dock?

A. She was moored normal fashion, upstream, head upstream, normal tie-up with head lines and spring lines.

(Testimony of Charles W. Foster.)

Q. How many lines did she have moored at the dock?

A. I would say she had three head lines, two spring lines, two——

Q. Explain to the Court and jury what you mean by that?

A. When a ship makes up to a dock, they moor then with large lines, Manila lines usually about 10 inches in circumference for a ship of that size to have, and they try to moor them head up because it is lot easier for the pilot to dock the ship heading into the water than it is the other way about, and you moor with an offshore head line which takes up from outside of the ship, an inshore head line which takes up from inside of the ship, and your third head line is usually left to the discretion of the Mate to take in tidal play or change it, and if you are in a tidal port and if you are in a river port it usually takes two offshore lines and one inshore line. They do the same thing aft. Then they put out what they call a spring line that goes in the opposite direction. Your head line is leading upstream. Your forward spring line leads aft, and your aft spring leads forward. That is to keep the ship [174] from surging back and forth or working.

Q. You mean back and forth up and downstream?

A. Yes. And also to keep your ship from bellying out if there is any wind.

Q. Now, then, these lines that were on the ship, each one you suggested, there would be about six, would there?

(Testimony of Charles W. Foster.)

A. There would be about eight, including the two spring lines.

Q. Two spring lines and six others?

A. That is correct.

Q. When a ship would list or dip towards the dock and it would go back—would it go back?

A. You mean if the ship is rolling at the dock side?

Q. Yes.

A. She will go back and forth the same way she comes over.

Q. Will it go clear back over on the river side the same distance on the dock side?

A. Yes; a ship with even stability, I mean a ship that has her stability will work even. If she goes two degrees one way, she will go back two degrees the other way. It is normal.

Q. In this particular situation, Mr. Foster, we have a case of glass that weighed approximately 1,500 pounds on one of these dollies that you are speaking about. Now, if there wasn't anybody pushing that crate of glass off the dolly, how would [175] it fall off?

Mr. Tatum: If your Honor please, I object to that as argumentative.

The Witness: I don't know.

Mr. Tatum: It invades the province of the jury.

The Court: Objection sustained.

Mr. Conway: All right. That is all; thank you.

Mr. Tatum: That is all, Mr. Foster; thank you.

(Witness excused.) [176]

JOHN V. LUNDSTROM

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tatum:

* * *

Q. What is your name?

A. John V. Lundstrom.

Q. What is your occupation, Mr. Lundstrom?

A. I am a gang leader now.

Q. You are a gang leader? A. Yes.

Q. Is that sometimes called a hatch boss?

A. That is right.

Q. You are a longshoreman? A. Yes.

Q. How long have you been longshoring?

A. 37 years.

Q. Were you the hatch boss of Mr. Macartney's gang the day he was hurt? A. Yes.

Q. Were you down in the hold at the time he was hurt? A. Yes.

Q. Did you see the load of glass fall on [177] him? A. No.

Q. Do you know where that load of glass was before it fell on him?

A. I couldn't tell you that because I was on the side opposite.

Q. You were over on the other side of the ship?

A. Yes.

Q. Did you see the load fall? A. No.

Q. Do you know whether the load was on a dolly or on the deck, the load that fell on Mr. Macartney?

(Testimony of John V. Lundstrom.)

A. I couldn't tell you that because I don't know.

Q. Do you remember last winter when Mr. Conway and I took the testimony of all of you long-shoremen? A. Yes.

Q. Do you remember testifying there about where the load was before it fell on Mr. Macartney?

A. No; I don't remember that. [178]

* * *

Q. Do you remember whether or not you testified at that time that the dolly—that the load had been put down on the deck instead of on a dolly? Do you remember so testifying?

A. Well, you would have to put the load on the dolly first before you set it on the deck. [179]

Q. Did you, after he wheeled it over by the square of the hatch, did you not testify that the load was put from the dolly onto the deck?

A. Well, he must have. When he left the dolly, he must have put it on the deck if he left the dolly.

Q. He must have put the load on the deck?

A. Yes.

Q. When he left the dolly unattended?

A. Yes.

Q. Why?

A. Well, I don't know what he did that for, I don't know, he had another case he had there he was going to hook that on before they sent that out.

Q. He had to set it down on the deck because it would not balance?

A. I don't know if it balanced or not. I guess he was running the dolly himself.

Q. He would have to put it down on deck because it would have been dangerous practice to leave the dolly unattended, wouldn't it?

A. Sometimes you leave them there. Sometimes you don't. It all depends on.

Q. But it is dangerous practice if he leaves it on the dolly unattended; is it not?

A. Sometimes if it don't balance I guess [180] it is.

The Court: You may ask the questions now. Read the deposition and ask if he so testified.

Q. (By Mr. Tatum): Do you remember testifying on December 7, 1956, before Mr. Conway and me and a Court Reporter, and I asked you this question:

"Q. He left the dolly?

"A. Sure; he must have put it down on the deck ahead of the dolly and went in front of it.

"Q. Because if he had not done that it would have been a dangerous practice to leave it on the dolly and go in front of it; is that it?

"A. Sure; he couldn't leave it on the dolly because it didn't balance. He had to set it down on deck to hold it.

"Q. If he had left it on the dolly—I mean he should not have left it on the dolly and came around in front of it? A. No.

"Q. He should take it off and leave it on the deck? A. Absolutely."

Do you remember so testifying?

(Testimony of John V. Lundstrom.)

A. Well, I don't remember what all I said. I can't remember anything I said there. [181]

* * *

EDWIN C. DAVIS

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tatum:

Q. Would you state your name, please?

A. Edwin C. Davis.

Q. Where do you live, Mr. Davis?

A. 5845 Northeast 29th.

Q. What is your occupation?

A. I am President of the Oregon Stevedoring Company.

Q. How long have you been connected with the Oregon Stevedoring Company?

A. Since January, 1930.

Q. What, in general, does your company do stevedoring?

A. What was the question?

Q. What do you do as a stevedoring company?

A. It is a contract business. We contract for the loading and discharging of ships' cargoes.

Q. How long have you done the work for the French Line here in Portland?

A. Well, the Oregon Stevedore Company was doing it before I came with them and is still doing it.

(Testimony of Edwin C. Davis.)

Q. So at least during the time you have been there they have been doing the work? [186]

A. Yes, sir.

* * *

Q. (By Mr. Tatum): How long have you been in the stevedoring business altogether?

A. This is my 43rd year.

Q. Will you state whether or not it is a common cargo for the French Line ships to bring in crates of glass into Portland?

A. Yes, it is. It is not a cargo that moves in large quantities but in small quantities quite regularly.

Q. Would you explain to the jury the mechanics of your operation? What happens between the ship-owner and you and the longshoremen on how you work these jobs?

A. Well, the contract stevedore contracts with the steamship company, usually direct with the representative of the steamship company. Sometimes they delegate the authority to their agent to make a contract, and we will contract with various companies because no one company would probably keep you in [187] business. You have to have a good many of them. In your contracts you work out rates for so much a ton or in lumber for so much a thousand feet board measure, work out prices for the loading or discharging of various cargoes and proceed then under your contracts, then, and it stipulates that the stevedore will furnish the suitable and necessary gear and equipment

(Testimony of Edwin C. Davis.)

as far as stevedore gear goes to handle the job properly.

Q. When a ship like the Wyoming comes in, tell us what the mechanics are. You are notified the ship comes in. Then what do you do?

A. The agent advises us when the ship is due to arrive, also gives us a discharge list if it was for cargo to discharge or a loading list if it is just loading, or both lists if it is discharging and loading, and we in turn check up with our operating manager and decide the proper number of gangs to put on the ship, depending what cargo she has, to give her the best dispatch and get her out as quickly as possible.

Q. Do you order the longshoremen from the hiring hall?

A. We order the longshoremen, and we, usually the day before or early of the morning she starts, move the necessary gear and equipment down to the edge of the dock where that ship is going to work the cargo and have everything ready to start to work.

Q. Does the ship tell you what cargo they want taken off or [188] put on?

A. Why, they could, but, actually, we get it from the discharge list which is made out by the ship.

Q. You are told by somebody on behalf of the ship what cargo you put on and what cargo you take off; is that right?

A. That is right.

Q. Then are you told by anybody on behalf of

(Testimony of Edwin C. Davis.)

the ship how you are supposed to take it off or put it on?

A. No; with very few exceptions, and that would be if there was some new commodity moving where the shipper of that cargo requests a particular care should be taken of it and state a preference as to how he would like to have it taken out. Well, then, we will do our best to comply with that, but, ordinarily, we send down the gear which in our judgment is the proper gear to be used.

Q. Who is in charge of the longshoremen for you; what position?

A. We have a man called a walking boss, and he is usually an older, experienced man that understands all types of rigging and cargo handling.

Q. Then who is next in the chain of command down to the longshoremen?

A. From that standpoint, the hatch boss.

Q. The hatch boss. Who direct the walking boss on what he should do with his gang, telling them what to do? [189]

A. The supercargo usually does that function; however, there is an unwritten law—it used to be written in the contracts, but later years it isn't—that a stevedore operates under the supervision and instruction of the Master and also of the officers. Well, that goes back to days before they had supercargoes, and those days then you did work underneath the officers of the ship.

Q. Do they tell you how to work the cargo? I

(Testimony of Edwin C. Davis.)

mean, does the Master or officer direct your men on what they should do?

A. Very seldom. They could if they wanted to.

Q. Are you acquainted with these glass dollies—show the witness the exhibit with the picture, please.

(Photograph presented to the witness.)

A. Yes; I am.

Q. Does your company own some dollies like that? A. Yes.

Q. On this job on the Wyoming did you furnish the dollies to your longshoremen who work down there? A. We did.

Q. How long have you been using dollies of that type?

A. Oh, I would say 12, 14 years we used to use them or take two-wheeled trucks, hand trucks, and that was an awkward way, and also cases of glass would get away quite often, so in inquiring around we took a pattern off of W. P. Fuller [190] Company who handle more glass, I guess, than anyone in this part of the country, and they had a type of dolly like in this picture, but they just ran around with a nice, smooth warehouse floor and don't have much trouble. Ours are made a little heavier to stand the gaff, and it is the same principal exactly as used by Fuller. We have used them and found them very satisfactory.

Q. Are those dollies regular stevedore equipment? A. Yes.

(Testimony of Edwin C. Davis.)

Q. Do the ships ever supply dollies like that to you? A. No.

Q. They are always supplied by the stevedore?

A. Yes.

Q. Are the same types of dollies being used to-day that were used 10 or 12 years ago?

A. They are.

Q. By your company? A. Yes.

Q. Have there been any recent changes in those dollies by your company?

A. Not that I know of.

Mr. Tatum: That is all. [191]

Cross-Examination

By Mr. Conway:

Q. Mr. Davis, did you have any occasion yourself to go down on the Wyoming on October 10, 1954, when she was here? A. I did not.

Q. You did not go down on the dock either at the time? A. No.

Q. So, so far as your own personal knowledge of the operation is concerned down there, you don't know anything about that, do you?

A. Only from the reports from my walking boss.

Q. That is what I say. From your own personal knowledge you do not know anything about it?

A. No.

Q. Who was your walking boss at that time?

A. I believe it was Harry Hangland.

Q. Harry Hangland? A. Yes.

(Testimony of Edwin C. Davis.)

Q. Is he here today? A. No.

Q. Do you know who the hatch boss was at that time under him?

A. In this particular hatch the time sheet shows Lundstrom.

Q. That was the gentleman who was here this morning? A. Yes. [192]

Q. Is Mr. Hangland still employed by you?

A. Yes.

Q. As a walking boss?

A. Yes; has been for many years.

Q. When did you first learn about this particular accident?

A. Oh, some time in the afternoon of that particular day that the accident occurred.

Q. How many times have you heard about cases of glass falling off these dollies?

A. I don't remember of them falling off this type of dolly. When we had the two-wheeled dollies years ago they used to get away from the boys and fall.

Q. You don't recall any falling from these?

A. Not that I recollect now, and we usually recollect it because when they fall off one of those dollies, why, they usually break a lot of glass, and that is expensive. It is plate.

Q. It is quite heavy, too, isn't it, Mr. Davis?

A. Oh, yes; plate glass is quite heavy, but the cases are—it is pretty well packed, and the case looks a lot bigger than what the actual weight of it would be.

(Testimony of Edwin C. Davis.)

Q. They are made of wood, are they, the cases?

A. Yes.

Q. How much would they weigh?

A. Various size cases; they vary. [193]

Q. Well, they start at what weight, how high; put it that way?

A. Well, we get some French glass, and those cases are small and weigh very little, but this particular case, I think the records show, was about 8 feet long and 3½ feet wide and around 10 or 12 inches thick.

Q. How much would the heaviest case of glass weigh that they move on these dollies?

A. I couldn't answer offhand without checking up the records.

Q. Well, would it be as much as a ton?

A. Oh, no; we couldn't—you couldn't handle that much on one of those dollies safely.

Q. 2,000 pounds? A. What?

Q. Could you handle 1,000 pounds?

A. I imagine you could get away with a thousand pounds all right, but it's more likely they run around 600.

Q. You think it would be dangerous to handle a case of glass weighing more than 600 pounds on this type of dolly?

A. I wouldn't say because I never tried it.

Q. Well, you just said you thought that it would be dangerous to handle one at 2,000 pounds.

A. Well, because it takes a lot of power to push 2,000 pounds even on a dolly of that type.

(Testimony of Edwin C. Davis.)

Q. Would it be dangerous to handle a case that weighs 1,500 [194] pounds on that type of dolly?

A. I don't know.

Q. That is all; thank you.

Mr. Tatum: That is all, Mr. Davis; thank you, very much. [195]

* * *

(Thereupon, the deposition of Pierre Canoen was read into the record as follows.)

DEPOSITION OF PIERRE CANOEN

"Direct Examination

By Mr. Tatum:

Q. Would you please state your name?

A. Pierre Canoen.

Q. What is your home? Where is your home, Mr. Canoen?

A. In Le Havre.

Q. Are you at present serving as Chief Officer of the MS Washington, a vessel of the French Line?

A. Yes.

Q. How long have you been serving as Chief Officer of the MS Washington?

A. 25th of June, 1956.

Q. Since the 25th of June, 1956?

A. Yes.

Q. Is the Washington a ship owned and operated by the French Line?

A. Yes.

Q. Have you served aboard any other vessels of the French Line?

A. Yes.

Q. How long have you been employed by the

(Deposition of Pierre Canoen.)

French Line? [198] A. Since 1936.

Q. Have you always been in the deck department of the ships? A. Always.

Q. How long have you been serving as an officer on French ships? A. Since '36.

Q. Do you hold a Master's license?

A. In France we have the license Captain au Long Cours, which enables you to be Master, yes.

Q. Have you ever served as Master on ships of the French Line? A. Yes.

Q. Have you ever served as Chief Officer of the MS Wyoming of the French Line? A. Yes.

Q. Is the MS Wyoming the same type of ship as the MS Washington on which you are now serving? A. Exactly.

Q. How long did you serve on the MS Wyoming as Chief Officer? A. One year.

Q. Were you serving as Chief Officer of the Wyoming when she was in Portland, Oregon, on October 8th, 1954, to October 10th, 1954? [199]

A. Yes."

Then we asked the Reporter to mark Exhibits 1, 2 and 3, photostatic copies of Pages 15, 16 and 17 of deck logbook.

"Q. (By Mr. Tatum): Before we get to these exhibits, Mr. Canoen, is the Chief Officer the man on the ship who is in charge of the cargo?

A. Yes.

Q. Do you have charge of planning where the cargo goes into your ship? A. Yes.

Q. Do you generally supervise both the loading

(Deposition of Pierre Canoen.)

and unloading of cargo? A. Yes.

Q. Do you work in supervising this through the local supercargoes? Do you carry on your supervision by working through a supercargo?

A. Yes.

Q. And so far as the longshoremen are concerned, do you work through the walking boss in unloading and loading? As cargo officer of this ship do you give orders to the longshoremen through the walking boss?

A. The foreman, yes." [200]

* * *

Afternoon Session

(At 1:25 o'clock p.m. the trial herein was resumed as follows.)

(In Chambers.)

MOTION FOR DIRECTED VERDICT

The Court: This motion is being made as if the portions of the deposition of Pierre Canoen that you have designated will be read into the record.

Mr. Tatum: All sides having rested, defendant moves for a directed verdict in its favor on the ground that there has been no substantial evidence to support any of the charges of unseaworthiness, and on the second ground that there has been no substantial evidence to support any of the grounds of negligence charged in the complaint.

The Court: I am going to take the motion for a directed verdict under advisement. As I indicated before, I am in general agreement with what you said, but in view of the Petterson case and some other cases decided by the Court of Appeals from the Ninth Circuit and the United States Supreme Court, I believe that I should let this case go to the jury at least for the purpose of getting their determination and their judgment on this case. [204]

* * *

DEPOSITION OF PIERRE CANOEN

(Continued)

“Q. What capacity was the ship loaded to when she left Portland?

A. 1,800 tons—no, no; 1,200 tons, 1,200 tons.

Q. And what is the fully loaded capacity in tons? A. 8,500 tons.”

Mr. Conway: Then going over to Page 34, please, about the third from the top question:

“Q. (By Mr. Conway): Well, according to your cargo plan on October 10th, 1954, how much cargo was on board when the ship arrived in Portland, on tons? A. 1,800 tons.

Mr. Conway: Now, he means by that that that is [205] the cargo that remained on board——

The Interpreter: ——when the ship came in Portland.

A. When the ship came to Portland they had 1,800 tons, approximately.

Q. On board? A. On board, yes.

(Deposition of Pierre Canoen.)

Q. How much did they discharge?

A. 560 tons unloading.

Q. How much did they put on?

The Interpreter: Put in?

Mr. Conway: Yes.

A. The tonnage weight is not marked on the log-book.

Q. Well, can he tell from looking at the logbook approximately how much that would weigh?

A. About 40 tons." [206]

* * *

INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen of the Jury, you have now heard all the evidence and the arguments of the attorneys in this case, and it is now my privilege and my duty to lay down for you the rules of law which you are to follow in deciding the questions of fact that the Court is about to submit to you. It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the law so given to the facts as you find them in the evidence before you, without any bias, prejudice or sympathy for or against either the plaintiff or the defendant. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that stated in my instructions.

You have heard the argument of the attorneys.

As they, themselves, told you, what an attorney says, either during the course of the trial or in his argument to you or to the Court is not evidence. The attorney is not under oath, and his duty is a partisan one to his client.

The purpose of an argument to a jury is to suggest inferences and deductions which the particular attorney believes may be drawn from the evidence. While you may follow the inferences and deductions that are made to you by a particular attorney, if they seem reasonable and logical to you, you are [207] not bound to do so. Here again I want to call your attention to the fact, as has been brought out here, that this is a case that belongs to the plaintiff and to the defendant and not to the attorneys, so please bear that in mind.

The Judge of a Federal Court has the privilege of commenting upon the evidence and upon the credibility of witnesses. I shall not do so in this case because this case has been presented by two very experienced lawyers with wide experience in this type of case.

You are the sole and exclusive judges of all questions of fact and of the credibility of all witnesses, and I am going to leave the determination to you. However, I will lay down certain rules of law to govern you in your determination of the facts, and these rules are final and binding upon you, whether you agree with them or not and whether they coincide with what an attorney says or not.

You are to decide the questions that are to be propounded to you solely on the basis of the evi-

dence that has been introduced at this trial; that is, the testimony and the exhibits and the instructions of the Court. If you have acquired, or believe you have acquired, any knowledge or information concerning any issue involved in this action from any source other than the evidence, you are not to convey such information to any of the other jurors, and you are not to consider it yourself. [208]

The plaintiff, Mr. Macartney, seeks to recover for personal injuries which he claims he sustained, and which he did sustain, on or about October 10, 1954, while on the M/S Wyoming, a motorship owned and operated by the defendant.

Before I take up the theories upon which plaintiff claims he is entitled to recover and the specific items under each theory, I call your attention to the fact that the defendant was not an insurer of the safety of the plaintiff. Just because an accident happened does not mean that, under the rules of law, there is any liability upon the steamship company. In other words, the mere happening of an accident does not entitle the plaintiff to prevail in the absence of a breach of duty on the part of the defendant which caused or assisted in causing the injuries which plaintiff sustained. There are such things as unavoidable accidents—accidents which happen without the fault of anyone—and if you determine that such is the case here, then your deliberations will be at an end, and your verdict must be for the defendant even though the plaintiff was in fact injured.

The plaintiff bases his action for damages on two

separate and distinct grounds. The first claim is based upon contract and the second on negligence. However, the facts which plaintiff is required to show are substantially the same for both claims.

In Plaintiff's claimed based upon contract he asserts [209] that the motorship operated by the defendant was unseaworthy in two respects: First, in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on said vessel. That is what the plaintiff contends first. Plaintiff's second contention is that the vessel was unseaworthy in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over. That is what plaintiff claims as his second ground.

I instruct you that it was the defendant's duty as the operator of said vessel to furnish plaintiff with a seaworthy vessel and safe and proper appliances in good order and condition. This duty which was imposed upon the defendant was not delegable. In other words, this duty cannot be passed on by contract, or any other method, and merely because Oregon Stevedoring Company was charged with the responsibility of loading the vessel does not relieve the defendant of its obligation to furnish a seaworthy vessel with safe and proper appliances in good order and condition. Likewise, knowledge or due diligence on the part of the defendant is immaterial insofar as seaworthiness is concerned for a ship is under an absolute duty to

furnish a seaworthy ship and appliances, but a seaworthy ship and appliances does not mean that the defendant was required to furnish a perfect ship or perfect [210] appliances, for the standard of seaworthiness is not perfection but reasonable fitness.

With reference to the first claim of unseaworthiness, in which it is claimed that the ship permitted the use of an unsafe and unseaworthy dolly, you have heard the evidence and I have already instructed you that it was the responsibility of the defendant to furnish a seaworthy ship with safe and proper appliances which were in good order and condition. You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evidence that the dolly upon which the crate of glass was placed was in an unseaworthy condition. That is the burden of the plaintiff. He must show that the dolly in question was unsafe and unseaworthy.

With reference to the claim that too much cargo was unloaded from one part of the ship, and as a result the ship was caused to lurch, careen, tilt, slant, lean and heel over, you are instructed that a test as to seaworthiness is whether in hull and gear the particular vessel was reasonably fit for the purposes of her voyage at that particular time.

Therefore, if you find from a preponderance of the evidence that the defendant breached its duty to provide a seaworthy ship and appliances and that, as a result of that breach, the plaintiff suffered

injury, then the defendant is liable to the [211] plaintiff.

The plaintiff has the burden of proof to establish this breach of duty because the law presumes that the defendant has performed all the duties incumbent upon it, and plaintiff, in order to prevail, must establish by a preponderance of the evidence that the defendant has not carried out those duties.

Preponderance of the evidence means the greater weight of the evidence. Now the greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you give the witnesses or by reason of other evidence that has been introduced.

If you find, with respect to plaintiff's claims against the defendant, that the defendant's vessel was seaworthy or that the evidence is evenly balanced or that the evidence inclines towards the contentions made by the defendant, then the plaintiff is not entitled to prevail on such claim.

Plaintiff's second ground for recovery against the defendant is based upon a claim of negligence.

Plaintiff is required under the law to specify the manner in which he claims that the defendant is at fault. I instruct you that he is bound by such specifications of negligence and must recover, if at all, on those specifications and no others. Before listing these specifications of negligence, [212] I call your attention to the fact that the defendant is a corporation, and corporations must necessarily act through their offices, agents or employees. If

you find that any officer, agent or employee of the defendant was negligent in any one or more particulars as contended by the plaintiff, then such negligence would be the negligence of the defendant corporation.

The specifications of negligence upon which plaintiff must recover, if at all, are as follows:

First, in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on said vessel; and,

Second, in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over.

These specifications, as you will note, are the same specifications alleged by the plaintiff to have rendered the ship unseaworthy. He asserts that they also constitute negligence.

Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. [213]

In this connection, I instruct you that the owner or operator of a vessel is under a duty to provide safe gear and equipment and a safe working place for all stevedoring operations on board ship. But, here, again, I want to call your attention to the fact that a ship is not an insurer of the safety of all persons using its facilities and that the standard re-

quired of the defendant is not absolute safety but reasonable safety. In other words, the defendant was not required to safeguard the plaintiff against all risk and danger, but only against risk and dangers that are unreasonable. The most reasonable conduct frequently creates risks to others. If such conduct is reasonable, no negligence can be said to arise from it.

You have heard the evidence, and it will be up to you to determine whether the plaintiff has proved by a preponderance of the evidence that the defendant was guilty of negligence in either particular, using the standard of reasonable care that I have outlined for you.

The plaintiff has the burden of proving by a preponderance of the evidence the charges upon which he relies. However, it is not incumbent upon him to prove both of these specifications under either the theory of unseaworthiness or under the theory of negligence. If he has proved either one of them by a preponderance of the evidence, you will then determine whether such unseaworthiness [214] or such negligence was a proximate cause of plaintiff's accident and injury.

Proximate cause is probable cause. It is that cause which, alone, or in conjunction with other causes, produced the accident and injury. Thus, an act or omission of a person, which sets in operation some factor or other thing that brings about an injury, is held to be a proximate cause of the injury unless the causal force or operation of the act or omission has been broken by some new or inter-

vening cause prior to the injury. A cause without which a result would not have occurred is a proximate cause. This does not mean that the law recognizes only one proximate cause of an injury, consisting of one act or omission by one person. On the contrary, acts or omissions by two or more persons may operate or work concurrently either individually or together to cause an injury and in such case each is regarded in law as a proximate cause.

If you find that the plaintiff, himself, did one or more acts which were the sole cause of the accident, then you could not find that any acts of negligence on the part of the defendant or any unseaworthiness on the part of the vessel was a proximate cause of the accident and injury even though you find that the vessel was unseaworthy or the defendant negligent. Likewise, if you find that the accident resulted solely from the negligence of Oregon [215] Stevedoring Company, or any of its employees, then your verdict must be for the defendant. On the other hand, if you find that the vessel was unseaworthy or that the defendant was negligent in one or more particulars charged by the plaintiff and that such unseaworthiness or negligence was a proximate cause of the accident and injury, you will find for the plaintiff on that issue, and you will take up the other questions that I will outline for you. Is that clear? If the ship was unseaworthy and/or if the owners of the vessel were negligent in either one or both of the particulars which I have outlined for you and that negligence or unseaworthiness was responsible in whole or in part

for Mr. Macartney's accident, then you will take up the other questions that I am going to outline for you, but if, on the other hand, you find that the accident was due solely to what Mr. Macartney did himself or solely due to what the Oregon Stevedoring Company or any of its employees, including Mr. Macartney, did, then your deliberations will be at an end, and you will bring in a verdict in favor of the defendant.

Of course, if you find that the ship was unseaworthy or negligent and this negligence or unseaworthiness combined with the negligence of Mr. Macartney or the Oregon Stevedoring Company employees to cause the accident and injury, you will find your verdict in favor of Mr. Macartney.

The defendant has contended that this [216] accident was solely caused by either the negligence of the plaintiff or the negligence of the plaintiff combined with the negligence of Oregon Stevedoring Company. As to the plaintiff, the defendant alleges that the plaintiff was guilty of negligence in three particulars:

First, in leaving a crate of glass unattended upon the dolly;

Second, in standing in front of a loaded dolly; and,

Third, in failing to keep a proper lookout.

I instruct you that the defendant was required to specify the manner in which he claimed that the plaintiff himself was at fault, and you may consider those three allegations of negligence asserted by the defendant against the plaintiff, and you may

not consider any other act of negligence which you may believe plaintiff was guilty of for any purpose whatsoever.

On the claim of negligence made by the defendant against the plaintiff, the defendant has the burden of proof on these three issues.

As I have told you before, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. This standard of care is applicable both to the ship and to the plaintiff, and it is also applicable to the employees of Oregon [217] Stevedoring Company. In other words, if the plaintiff himself failed to conduct himself in accordance with that standard, he would be guilty of negligence. With reference to the first two specifications of negligence asserted by the defendant against the plaintiff; namely, that the plaintiff left a crate of glass unattended upon the dolly, and that he stood in front of a loaded dolly; you have heard the evidence and it will be up to you to determine whether the defendant has proved that the plaintiff himself was guilty of negligence.

In other words, the question is did the plaintiff himself act as a reasonably prudent person would have acted under the same or similar circumstances in leaving the crate of glass on this dolly unattended and in standing in front of this dolly with this load of glass. With reference to the third speci-

fication of negligence; namely, that he failed to keep a proper lookout, I instruct you that every person who is in full enjoyment of his faculties of seeing and hearing is required to make reasonable use of all of his senses and to maintain a proper lookout with a view to the discovery of perils by which he may be menaced and their avoidance after they have been ascertained.

If you find by a preponderance of the evidence that the plaintiff did not maintain such a lookout, then he would be guilty of negligence. If such negligence was the [218] sole cause of the accident, plaintiff could not recover and your deliberations will, therefore, be at an end, and you will return a verdict in favor of the defendant. If, however, such negligence, if any, merely contributed to the accident, then plaintiff would be entitled to recover, provided the defendant was likewise guilty of negligence or the ship was unseaworthy and such negligence or unseaworthiness contributed to the accident.

As an additional defense, defendant asserts that the accident-injury suffered by the plaintiff was due to the negligence of the plaintiff's fellow longshoremen in that they failed to attend the crate of glass upon the dolly and in bringing a loaded dolly into the position where other operations were being conducted.

Now, with reference to the negligence of fellow longshoremen, I instruct you that the standard is the same for them as for anyone else, and if they did something which a person of ordinary prudence

would not have done under the same or similar circumstances or if they failed to do something that a person of ordinary prudence would have done under the same or similar circumstances, they would be guilty of negligence. However, the only way the negligence of plaintiff's fellow workers could affect plaintiff is that if you find that their negligence was the sole and proximate cause of the accident. If you find that the ship was unseaworthy or the [219] owners of the vessel were negligent and if you also find that the employees of Oregon Stevedoring Company, other than the plaintiff, were likewise negligent, and the negligence of each caused or contributed to the accident, then plaintiff is entitled to recover. This is true because the negligence of plaintiff's servants may not be imputed to the plaintiff, and this would also even be applicable even if you find that the plaintiff itself was guilty of some negligence because in order for the company to avoid liability for plaintiff's negligence, plaintiff's negligence must be the sole cause of the accident.

I think this is an appropriate place to tell you that I am going to ask you to answer a couple of questions. The first question is: Was the dolly dangerous and unsafe? I am going to use the word, instead of "dangerous," I am going to say "unseaworthy." I am going to use the words: Was the dolly unseaworthy or unsafe? Will you please answer that Yes or No?

The second question I am going to ask you is: Was the Motorship Wyoming caused to lurch,

careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time? You will answer that Yes or No.

I want the foreman, whoever he or she may be, to be sure that in addition to the general verdict that this [220] special verdict be answered, and on these questions the answers must be unanimous. In other words, it must represent the unanimous opinion of each juror.

If you find, under the instructions that I have already given you, the plaintiff is entitled to recover, you will consider the question of damages. The fact that I am instructing you on the question of damages does not mean that I am or am not of the opinion that plaintiff is entitled to recover in this case because on that issue, while I am expressing no opinion one way or the other, I am going to leave it up to you to determine.

Damages, like every other proposition, must be proved by a preponderance of the evidence on the part of the person having the burden of proof, and the plaintiff on that issue has the burden of proof. In assessing damages, you should take into consideration the injuries which the plaintiff has sustained, the pain and suffering which he has endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should take into consideration any permanent disability which plaintiff has sustained as shown by the evidence, any loss of power in performing labor, any impairment of the

ability to earn money considering his position and station in life—and, generally, Ladies and Gentlemen, you should give him such amount as, under the evidence in this [221] case, will reasonably compensate plaintiff for pain and suffering and injuries past, present and future.

Plaintiff contends that he has been permanently injured, and I think that the evidence is clear that he has sustained permanent injury and disability. If you find in favor of the plaintiff in this case, you can take into consideration his life expectancy. Plaintiff is 45 years of age, and, under the standard mortality tables, he has a life expectancy of 24.54 years. That is about 24½ years. The fact that he has this life expectancy does not mean that he will live that long, or that he will not live longer. Neither does it mean that he will be employed and earning during this entire period. However, it is one factor that you can take into consideration along with evidence of his age, sex, health, habits, and the nature of his occupation, to determine what his actual life expectancy will be. You will then take into consideration whether plaintiff's injuries permanently affect his ability to work or follow his occupation.

He claims that as a result of his injuries he has lost \$8,000 in wages to date, and in the event you find in favor of plaintiff you may allow him such sum as has been proved by the evidence, not exceeding the sum of \$8,000.

He claims that he has spent \$1,989.04 for the reasonable value of medical and hospital expenses.

If you find for him, he would be entitled to that amount as well. [222]

Your decision with reference to the amount of damages must be reached and founded upon an unprejudiced consideration of all the facts and without any sympathy, prejudice or desire to punish anyone, and without any thought of plaintiff's financial condition or the defendant's ability to pay.

If you find that plaintiff, although entitled to recover, was guilty of some act of negligence which contributed to the accident, then you will reduce the amount of damages which you found in proportion to the negligence of the respective parties. For example, if you find that the plaintiff was contributorily negligent and that such negligence was responsible for 25 per cent of his accident and injuries, then you will reduce the amount of damages by 25 per cent, and you will award plaintiff 75 per cent of the recovery which you would have given him if he, himself, had not been guilty of negligence. Now this 25 per cent figure is just by way of example. If you find he was 50 per cent contributorily negligent, you would cut the damages in half. You would first find out what he would be entitled to if no negligence occurred on his part, and if he was 50 per cent negligent you would cut that award in half. If he was 25 per cent negligent you would give him three-quarters. If he was 75 per cent negligent you would only give him one-quarter. That is the way you do that. The amount of damages [223] which you put in the verdict is the amount plaintiff has and will sustain after the reduction, if any, and

that will be the amount of your verdict. You do not put a full amount in the verdict if you find that he is guilty of contributory negligence. You put in an amount after the deduction, if any.

This case is not to be decided on any basis of sympathy, passion or prejudice. You must be guided solely by the evidence and by the rules that I have laid down for you.

You are the sole and exclusive judges of the facts and the credibility of all witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case. Every witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given or by contradictory evidence. If you find that any witness has testified falsely in one material part of his testimony, you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false, you will be [224] at liberty to disregard all the testimony given by such witness unless corroborated by evidence which you do believe.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if

true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eyewitness, that is direct evidence, and you have that type of evidence in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself conclusively establish the fact, but affords an inference or presumption of its existence. You have that kind of evidence in the X-rays and in the exhibits that have been introduced in evidence. Indirect evidence sometimes may be stronger on account of the inferences that may be drawn from it than the testimony of eyewitnesses.

I think I have already instructed you on what a quotient verdict is. You cannot arrive at your verdict by any mechanical means. That means you cannot, if you decide in favor of the plaintiff, you cannot say, "Now, let's have a simple way of arriving at this verdict. Each of us will put down the amount he or she believes the plaintiff is entitled to and we will add it up, and we will get a certain figure, and then we will divide it by 12 and agree that that [225] will be the amount of the verdict." You cannot do that. On the question of damages, just like the question of liability, you must agree unanimously.

When you go into the jury room you will have an opportunity to talk the matter over, and I hope you will discuss each phase of this case, and I hope that you will be able to agree on all the questions and all the answers, but that does not mean that I am

instructing you to agree. I am telling you if you can possibly do that without violence to your conscience and your oath as jurors, and I hope you come out with a verdict.

In addition to the two interrogatories that I submitted to you, I am going to submit two forms of verdict. One verdict reads, "We, the jury, duly empaneled and sworn to try the above-entitled cause, find our verdict in favor of plaintiff and against the defendant and assess damages in the amount of blank dollars." In this blank space you will put the amount that you find plaintiff is entitled to after the reduction for contributory negligence, if any. If, on the other hand, you find in favor of defendant, you will use the verdict which says, "We, the jury, being duly sworn to try the above-entitled cause, do find our verdict in favor of defendant." Either verdict must be signed by the foreman. The foreman alone signs the verdict in this court, but I want to admonish the foreman, whoever he or she may be, to make [226] sure that the verdict represents the unanimous opinion of all of the jurors. Before I submit the case to you, there is a legal matter which I would like to take up with Counsel in chambers.

(Thereupon, the following proceedings were had in the Court's chambers.)

PLAINTIFF'S EXCEPTIONS
TO COURT'S INSTRUCTIONS

Mr. Conway: Your Honor, I think that maybe the Court overlooked the matter of instructing in connection with the amount of damage or the theory of damage involved here because, as I get the impression from your instructions, you spoke about \$8,000 as the money that the plaintiff lost up to the time of trial, and you had \$1,989.04, whatever it was, also hospital and doctor bills and what have you, and then I didn't hear you say anything about his future loss of earnings or how much damages the jury could allow him if they thought he was entitled to damages. I think we were suing for \$85,000 for general damages, for example, and then we had about \$8,000 special——

The Court: I said, "In assessing damages, you should take into consideration the injuries which plaintiff has sustained, the pain and suffering which he has endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should also take into account any permanent disability which the plaintiff has sustained as shown by the evidence, and any [227] loss of power in performing labor, any impairment of the ability to earn money, considering his position and station in life—and generally, ladies and gentlemen, you should give him such amount as, under the evidence in this case, will reasonably compensate plaintiff for pain and suffering and injuries past, present and future."

Mr. Conway: Yes, that is right, Judge, but the though I had in mind was this: I do not want you to misunderstand me. The jury might get the impression when you do not mention any sum there in that connection that they would have to find, for example, say for \$10,000.

The Court: I will take care of that.

Mr. Conway: Because they might say——

The Court: I will tell them.

Mr. Conway: You didn't say anything about No. 2.

The Court: Did what?

Mr. Conway: Say anything about the dolly.

The Court: What is that?

Mr. Conway: He has got No. 2 request here. I don't think you gave it, but I just want to make sure, "If you find the dolly being used by plaintiff at the time furnished by his employer, Oregon Stevedoring——

The Court: I did not give that.

Mr. Conway: I just wanted to make sure you didn't.

The Court: No. [228]

Mr. Conway: Okeh. I think that I made a request here in my requested instruction No. 7, your Honor, in this instruction that I took out of this case of Talbot vs. Hahn.

The Court: What is the instruction?

Mr. Conway: I didn't think you gave all that instruction there.

The Court: Mr. Conway, I didn't give any instruction which you have requested. except one little

portion, because these are the instructions I have been giving in many cases that I hear, and I didn't redraft all of them.

Mr. Conway: I understand, your Honor, but I just call that to your attention.

The Court: Is there anything which you think I should have instructed but didn't?

Mr. Conway: Well, it was in connection with this unseaworthy problem we have here. The problem I had in mind, Judge, is that a duty extended to Mr. Macartney who was on board the Wyoming with the consent of the defendant corporation who was engaged in loading crates of glass, if the ship was obligated in the exercise of reasonable care——

The Court: I covered that in the main.

Mr. Conway: That is all.

DEFENDANT'S EXCEPTIONS TO COURT'S INSTRUCTIONS

Mr. Tatum: Defendant objects or takes exception to the Court's failure to give Requested Instruction No. 1, which was for a directed verdict, and Requested Instruction 2, which had [229] to do with the dolly being the responsibility of the stevedore and not of the ship.

I also except to the Court's instruction that it was the ship's obligation to prepare safe and proper appliances in good order and condition to have a seaworthy ship, insofar as that instruction applies to the dolly, in that it is the defendant's contention that the dolly is not a part of the ship's gear to be

considered as a safe and proper appliance to become seaworthy. I further except to the Court's instruction that the defendant would be negligent in permitting the use of this dolly in that it is my understanding of the Petterson case that it applied only to seaworthiness and not to negligence.

The Court: Before the Petterson case I would never have instructed the way I have today, and early this morning I came down, and I read the Petterson case again. I came to the conclusion that I would have to restrict the reach of that decision by granting your requests, and therefore I have instructed the way I have because I think it is in line with the Petterson case.

Now you have raised the question of unseaworthiness as opposed to negligence, and I think that that is a distinction without a difference myself, and I am going to deny your request unless Mr. Conway thinks that I should grant it and only limit it to unseaworthiness. [230]

(Discussion off the record.)

The Court: Mr. Conway, earlier I asked you specifically whether you wanted to rely on both negligence and unseaworthiness, and that was the basis for my concern, but you answered that you wanted—you had both of them in your complaint and pre-trial order, and you wanted them both. That is why I gave them. Usually the plaintiff's attorneys waive one of these.

Mr. Conway: You are talking now about the dolly; is that right, Judge?

The Court: I am talking about the two theories instead of one theory, and I am also talking about the dolly in particular, that I thought it would be an easier way to submit this case, to have it submitted solely on the theory of unseaworthiness or solely on the theory of negligence, and I asked you specifically what you wanted to do, but I cannot change it now.

Mr. Conway: No, I think the way it is now we will just let it go as is. I am not going to change my position at this stage of the game.

(Thereupon the following proceedings were had before the jury in open court:)

The Court: I want to call your attention once again to the verdicts.

If you find in favor of plaintiff, you will put in that blank space the amount of damages to which you believe [231] plaintiff is entitled, and in that figure you would put in the special and general damages. In other words, you cannot allow more than \$8,000 for loss of wages and more than \$1,989.04 for medical expenses. That is for the special damages. In addition to that amount, of course, you would allow him such sum as you believe plaintiff is entitled to for the pain and suffering and the injuries which he has sustained and about which I instructed you at considerable length. In that one figure you take into consideration the general damages as well as the special damages, and then you reduce it by the amount which you find plaintiff has been guilty of contributory negligence.

On the other hand, if you find for defendant, you would use the other form of verdict.

Swear the Bailiff.

(Bailiff sworn.)

The Court: You will retire and deliberate.

(Thereupon, at 3:00 p.m., the jury retired for deliberation.) [232]

TRANSCRIPT OF ADDITIONAL INSTRUCTIONS TO THE JURY

(The jury having been duly instructed by the Court in the above-entitled cause, and having retired at 3:00 p.m. for deliberation on their verdict and returning to the courtroom at 6:00 p.m., the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I understand the jury is in disagreement. Who is the foreman?

Mr. Herman J. Foeller: I am, your Honor.

The Court: Is it correct that the jury is in disagreement?

Mr. Foeller: That is correct.

The Court: Is there any instruction I gave that was not clear and which you would like to have repeated?

Mr. Foeller: I think the instruction if you find negligence in the hold of the ship where it is imputed on down to the steamship itself, if that is clarified we could reach a decision. We are a little confused that there may have been some negligence

down there by the employes, and the opinion is that because they were a stevedoring company and so on, down to the French Line itself.

The Court: Let me just say this to you, and what I am going to say now must be considered in the light of the instructions which I previously gave you. Ordinarily, I do not like to give one instruction because it lays greater emphasis on it, but I think what I said before and what I repeat now is the test of what a reasonable person would have done under the same or similar circumstances. In other words, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

There are two grounds upon which the plaintiff claims that the ship was at fault: One, in permitting to be used and in using a dangerous, unsafe, and unseaworthy dolly or hand truck as part of the regular gear, appliances, or equipment used on the vessel.

In other words, in order to find for plaintiff you have to first find that this dolly was unsafe and unseaworthy, or, in the alternative, if you find that the ship caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean and heel over. In order to find for plaintiff you have to find that one of these two things which were proved by

the plaintiff caused or participated in causing the accident.

If the acts of the employes of the Oregon Stevedoring Company were solely responsible for the accident, or if the plaintiff himself did something, one or more things, for instance, failing to keep a proper lookout or leaving the dolly unattended with the glass on it, if you find that that is solely the cause of the accident, then you would return a verdict in favor of the ship.

You would return a verdict in favor of Mr. Macartney, the plaintiff, if you found that the dolly was defective or if the ship was leaning, and as a result of that he suffered this accident.

It is also true that if the ship was negligent and if Mr. Macartney was negligent and the negligence of both combined to cause the accident, then you would allow plaintiff to recover, but you would reduce the damages.

Has that helped you any?

Mr. Foeller: It has helped me some.

Mr. Keswick: It has helped me plenty.

The Court: I want to suggest a few thoughts which you may consider in your deliberations along with all the evidence and all the instructions which I previously gave you.

I know that you have been deliberating now for some time. This is an important case, and the trial, while it has not been long, it has been expensive for both sides, and if you fail to agree upon a verdict the case is left open and undecided. Like all cases, it must be decided sometime, and there appears no

reason to believe that the case can again be better tried or more exhaustively tried. As I told you, the case was presented by two very competent lawyers, both of whom knew their business. Any future jury must be selected in the same manner and from the same source as you have been chosen so there appears no reason to believe that the case would be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it or that clearer evidence can be produced on behalf of either side.

Of course, these matters suggest themselves, upon brief reflection, to all of us who have sat throughout this trial. The only reason I mention them is because some of them may have escaped your attention because you may not have been devoting your time to a review of the evidence and the law.

I think I told you before that I do not expect anyone to surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or solely for the purpose of returning a verdict. I do not think a person should do that; however, I think I told you just before the conclusion of my remarks that it is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors, and in the course of your deliberations you should not hesitate to change your opinion when convinced that it is erro-

neous. In order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to, and regard for the opinions of the other jurors. That is to say, in conferring together each of you should pay due attention and respect to the views of others and listen to each other's arguments with a disposition to re-examine your own views. If much the greater number of you are for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict.

On the other hand, if a majority or even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt.

I think that while one juror, if he is convinced that all the rest of them are wrong, may hold out, and should, but the greater the number who are on one side, the more those dissenting jurors should re-examine their views to see whether there is a ra-

tional basis for the opinion which they hold when other jurors or so many other jurors are of the contrary opinion. I think in other cases I have told you, those of you who have served, that you are not partisans. You are judges, judges of the facts, and your sole purpose is to ascertain the truth from the evidence before you. You are the sole and exclusive judges of the credibility of all witnesses and the weight and effect of evidence, and in the performance of this high duty of jurors you are at liberty to disregard all comments of the judge as well as the attorneys, including, of course, the remarks which I am now making.

I hope you will remember that no juror is expected to yield the conscientious conviction which he or she may have as to the weight or effect of evidence, but remember also that after a full deliberation and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

It is 6:15. If you want to go back and deliberate now, that is fine. If you want to go out for dinner, that is perfectly all right, and you can then deliberate later. I am not trying to rush you. You can deliberate as leisurely as you want. I am hopeful that you can arrive at a judgment if you can do so without violation of your individual conscience, but again I want to say that I am going to leave it up to you.

What do you want to do about it?

Mr. Foeller: We will go back upstairs.

The Court: Is there any question, Mr. Kniss?

Mr. Kniss: Yes, your Honor. If I understood you properly now, it is a decision that even though we find the plaintiff—what do I want to say here—negligent and the steamship both negligent to some degree, we still can allow damages or some of that?

The Court: That is right. If you find that the steamship company did something they should not have done or failed to do something they should have done, you can find for plaintiff even though you find that the plaintiff did something he should not have done, and under those circumstances you apportion the damages.

Mr. Kniss: That is right.

The Court: But if you find that the stevedoring company was solely responsible for the accident or if you find that the plaintiff was solely responsible for the accident, you may not return a verdict in favor of the plaintiff. If you find, however, that the steamship company did something that it should not have done and what it did caused the plaintiff's accident and the plaintiff was free from negligence, then you give the plaintiff the full amount of damages. Do I make myself clear on that?

Mr. Kniss: I think that is the main point that was holding us up.

Mr. Christal: There are only two points we can judge on; that is, the equipment and the rocking of the boat?

The Court: That is all. You cannot consider anything else. I just want to answer your questions. You can only consider those two things that the

plaintiff has specified. You cannot consider any other ground of negligence not raised, that I did not instruct you on, even though you think that the company was negligent in that respect or even though you might think that the plaintiff was negligent in some respect not designated. Mrs. Hraby?

Mrs. Hraby: Could you please give us a definition of the word "defective."

The Court: "Defective" in this instance would be a piece of equipment which a reasonably prudent person would not have maintained. It does not have to be a perfect piece of equipment. I think I explained that to you. The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances.

(Thereupon, the jury retired for further deliberation.)

Certified to be a true and correct transcript of said additional instructions to the jury.

July 16, 1957.

/s/ GORDON R. GRIFFITHS,
Court Reporter.

[Endorsed]: Filed July 15, 1957.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS ON MOTION OF PLAINTIFF TO PROSECUTE APPEAL IN FORMA PAUPERIS

Mr. Conway: If the Court please, in the matter of this case of Macartney vs. Compagnie Generale Transatlantique, Civil No. 8512, at this time, your Honor, we have a motion of the plaintiff before the Court for an order that he be permitted to appeal, to prosecute the appeal in this case on the judgment entered on April 24, 1957, to the United States Court of Appeals for the Ninth Circuit under the provisions of Title 28, Section 1915, United States Code Annotated, without prepayment of fees and costs or security therefor, as plaintiff is unable to pay same.

The Court: I notice, Mr. Conway, that the only thing you have is a conclusion that you are unable to pay the same. As I recall the testimony, he was earning around \$400 a month. His wife was employed, and he owned his own home. He had a car.

In all the other affidavits that I have seen, the people who attempt to appeal in forma pauperis have set out their assets and their liabilities so that the Court can determine whether they are in a position to pay their own costs. I notice you have not done it.

Another thing, you mention the fact he is 48 years old, married, with three children. As I recall the testimony, none of those children were depend-

ent upon him for support, and the same thing is true with the fact that you say he has approximately nineteen hundred dollars medical and hospital [2*] bills. The insurance company, I thought, was paying that. If I understand these cases correctly, he is not the only one involved. There is an insurance company which would participate in any award that is granted. Isn't that true?

Mr. Conway: Your Honor, I might suggest for your consideration that I have been practicing law here in Portland for twenty-five years, and I never had one of these proceedings before. I left this affidavit with Mrs. Mundorff several days ago. When I called her I said I don't know anything about this. I wanted to find out if that is all right.

The Court: Mrs. Mundorff said that you asked that this be turned over to Judge McColloch.

Mr. Conway: I wanted to find out, your Honor, what to do, if it was okeh. I am just explaining to you my situation because I never had one, your Honor, and so I did that. Then she said she talked to you because the Judge said that you had to determine it because you were the trial judge. I looked in the statute, your Honor, and it says "affidavit." That is the reason I made an affidavit, and then I did that. I tried to follow the statute. There is a lot of things about these proceedings, your Honor, that I don't know, and I will confess my ignorance.

As I say, it is the first time I have ever had one in twenty-five years of practice. All I ever did was

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

follow the statute. His wife tells me they have got a duplex that [3] has got a \$17,000 mortgage on it where they live, and the nineteen hundred dollars we are talking about, it is true that if he recovers in this case, the only cash—he has got to pay that back to the insurance company on the Harbor Workers Act. That is what he has got.

Now, then, as far as ability to pay is concerned, you have got the income tax returns made out which show he was making about twenty-five hundred dollars for the last couple of years there by the time when he got walking again, and his wife was working down here in a beauty salon. As your Honor knows, it costs several hundred dollars to appeal one of these cases. That is the problem, your Honor. I am just being frank with you.

The Court: I think you ought to set out with particularity what he has. The cases seem to indicate that you must do that because the affidavit must be sufficient upon which to predicate a perjury charge if it is found to be false; therefore, I believe that you should set out what assets he has and what income he has had and what his present income is certainly from the first of the year. You should set that out because otherwise the affidavit is merely a conclusion.

You have a lot of material in here that is absolutely irrelevant, and yet on the real issue you just have four or five words. [4]

I want to say also with reference to the main issue that I was surprised when I made a check and learned that you and Mr. Tatum did not waive

your presence here at the time the supplemental instructions were given. I was in error. I was under the impression that you had; but I subsequently learned that the waiver referred to your presence at the time of receiving the verdict and not to the giving of the additional instructions. However, I have looked over the instructions, and I cannot see anything erroneous about them. In fact, I thought that in one particular they were probably more beneficial to you than that to which you were entitled.

All this is in addition to the fact that throughout the trial I indicated to you that I could not see where there was any negligence. I know that I told you that at the end of the plaintiff's case in chief and again when the case was completed. I believe I indicated to you, but, if I didn't, I intended to tell you that if you did get a verdict I would set it aside on the ground that there was no evidence of negligence whatsoever on either of the two grounds that you alleged. In view of that fact, I am not in a position to certify that this appeal has any merit, and under no circumstances would I order the Government to pay the costs of a transcript and record on appeal. In view of my strong belief about the lack of merit of your case, I cannot see how I could do [5] that.

As far as the first part of it is concerned on the prepayment of costs, that is a little different category, and if you will get a proper affidavit showing that the man actually is a pauper and not in a posi-

tion to pay these costs I will grant that portion of your motion.

Mr. Conway: You see, your Honor, he is a little bit fearful of the future and his inability to earn a living in view of this unfortunate injury he has, and that bothers him quite a bit.

I was going to suggest that the Petterson case we had a few years ago went up in Seattle where the block that was brought on board by the stevedoring company broke, the way that opinion reads, your Honor, it indicates that when that happens the ship would be unseaworthy as a matter of law.

The Court: Mr. Conway, I instructed the jury on the basis of the Petterson case.

Mr. Conway: I am not questioning that, your Honor. I am trying to bring up something, if you will just bear with me a moment; what I was getting at was this: If that is true with a broken block being unseaworthy as a matter of law, which the Court of Appeals has practically held, as I understand from reading it, what is the difference between a dolly tipping over and being unseaworthy because it tips [6] over? I might be wrong, your Honor. I understand how you feel, but I am just drawing it to your attention.

The Court: I think if you want to file a new affidavit and set out his income and what his earnings have been, and I think that his wife's earnings also should go in there, and if it develops that he is not in a position to pay costs I will grant the first portion of your motion unless there is some reason why I should not. I have not heard from Mr. Tatum.

Do you agree? You have handled these cases. I think you were in the Gillis case where I did the same thing. I did not order the transcript, but I was of the opinion that an order should be entered relieving them of the duty of prepaying costs.

Mr. Tatum: I believe that is correct, your Honor. I came up with Mr. Conway this morning, and I told him I would not oppose any motion he might wish to make. I am not concurring in it, but if he makes his case that is up to him to make his deal.

(Discussion between counsel off the record.)

Mr. Conway: Well, Mr. Tatum says it was a nominal cost and the stenographic transcript and the cost of printing.

The Court: That is right. I do not know what the costs would run.

As the record now stands, I am going to deny [7] the request with leave to file an amended affidavit.

Mr. Conway: You want prepared and filed an amended affidavit, and do you want another motion?

The Court: No; I think you can improve the affidavit setting out these various items of assets and liabilities and income, and if on the basis of that it indicates that they are not in a position to pay and they are entitled to waive the requirements for prepayment of costs, I will do it, but I think it should be a complete affidavit of their assets and liabilities.

Mr. Conway: As a matter of information, your Honor, you are only talking about prepaying the filing fees?

The Court: Yes.

Mr. Conway: Not the stenographic transcript or printing?

The Court: No; I would not grant that.

Mr. Conway: You would not make that kind of an order anyhow?

The Court: That is right.

Mr. Conway: And the other one, I suppose, would be less than a hundred dollars from what Mr. Tatum says.

The Court: I do not know.

Mr. Conway: I think most anybody can raise that. That is what I understood, and I didn't want to take up the Court's time with something that involved less than a hundred dollars. [8]

The Court: I have not any idea of what that would cost.

Mr. Conway: I am just being frank with the Court. I didn't want to take your time and Counsel's time with something less than a hundred dollars.

(Hearing concluded.)

Certified to be a true and accurate transcript of all proceedings had at the time and place mentioned in the caption, in the above cause.

/s/ GORDON R. GRIFFITHS.

[Endorsed]: Filed August 22, 1957. [9]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer, Pretrial Order; Plaintiff's Requested Instructions; Defendant's Requested Instructions; Interrogatories; Verdict; Judgment Order; Notice of Appeal; Bond for Costs on Appeal; Designation of Record on Appeal; Statement of Points on Appeal; Order Extending Time to Docket Appeal; Supplemental Designation of Record on Appeal; Order for Transmittal of Exhibits to Court of Appeals and Transcript of Docket Entries constitute the record on appeal from a judgment of said court in a cause therein, numbered Civil 8512, in which Walter Herbert Macartney is the plaintiff and appellant and *Compagnie Generale Transatlantique*, a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings and testimony of April 23, 24, 1957, and transcript of additional instructions to the jury. Plaintiff's Exhibits

3-A and -B; 27 and 7-A to -F, inclusive, and Defendant's Exhibits 6-A and -B and 23 are being forwarded under separate cover. Transcript of May 21, 1957, to be forwarded at a later date.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 8th day of August, 1957.

[Seal] R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15664. United States Court of Appeals for the Ninth Circuit. Walter Herbert Macartney, Appellant, vs. Compagnie Generale Transatlantique, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 9, 1957.

Docketed: August 15, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 15664

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTI-
QUE, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL

To: The above-named defendant, Compagnie Gen-
erale Transatlantique, a corporation, and to
Wood, Matthiessen, Wood and Tatum and
Lofton L. Tatum, your attorneys:

You and each of you will please take notice that
the said appellant, Walter Herbert Macartney,
hereby adopts as his points on appeal the following
Statement of Points on Appeal, to wit:

1. That the trial court erred in giving supple-
mentary instructions to the jury after the jury had
been out approximately three hours and could not
agree on a verdict, which supplementary instruc-
tions were given in the absence of the parties and
their respective attorneys who were not notified of
such proceedings, and without affording them an

opportunity to be present, and to make any objections to any portions of such supplementary instructions.

2. That in connection with such supplementary instructions, the trial court erred in emphasizing and restating certain portions of the court's former instructions favorable to the appellee as to the non-liability of the appellee in this cause.

3. That the trial court erred in failing to instruct the jury correctly as to the amount and measure of damages involved in this case, as requested by appellant in his requested instruction number VIII.

4. That the trial court erred in his supplemental instructions to the jury by instructing the jury to the effect they should be convinced and decide beyond a reasonable doubt which is confusing and conflicting with his original instructions which he gave upon the theory of preponderance of the evidence, and puts a greater burden upon appellant than the law requires.

5-a. That the trial court erred in his supplemental instructions to the jury by incorrectly stating the law as to the test of seaworthiness by instructing as follows:

“The test of seaworthiness is not perfection, but what a reasonably prudent person would have done under all the circumstances.”

b. Such instruction is also confusing and conflicting with the Court's original instructions which

he gave regarding seaworthiness and a test for seaworthiness.

* * *

Dated at Portland, Oregon, this 13th day of August, 1957.

/s/ JOHN F. CONWAY,
Attorney for Plaintiff-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed August 15, 1957.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the respective parties hereto, appearing by their undersigned attorneys, that all of the original exhibits in this case need not be printed, but may be considered by the appellant court in their original form.

Dated at Portland, Oregon, August 13, 1957.

/s/ JOHN F. CONWAY,
Attorney for Appellant.

/s/ LOFTON L. TATUM,
Attorney for Appellee.

So Ordered.

/s/ ALBERT LEE STEPHENS,
United States Circuit Judge.

[Endorsed]: Filed August 20, 1957.

